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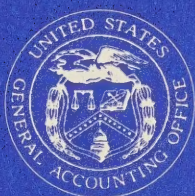
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December 1997

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H-2A AGRICULTURAL GUESTWORKER PROGRAM

Changes Could Improve Services to Employers and Better Protect Workers



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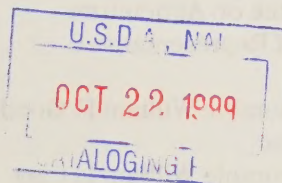
Congressional Committees

As mandated by Division C of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208) and the Conference Report for the Agricultural Rural Development, FDA Appropriation Act of 1997 (P.L. 104-726), this report presents information on (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and if a significant number of nonimmigrant guestworkers is needed in the future. We are sending this report to you because of your committees' oversight responsibilities for federal agencies involved in the H-2A program. (See list of addressees on p. 2.)

We are providing copies of this report to Members of Congress who contacted us about this mandate; the Secretary of Labor, the Assistant Secretaries for the Employment and Training Administration, Employment Standards Administration, and Occupational Safety and Health Administration; the Attorney General and the Commissioner of the Immigration and Nationalization Service; the Secretary of Agriculture; the Secretary of State; and others who request them.

If you have any questions about this report, please contact Carlotta C. Joyner, Director, Education and Employment Issues, at (202) 512-7014. This report was prepared under the direction of Charles Jeszeck, Assistant Director. Other major contributors to this report are listed in appendix XI.

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List of Addressees

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The Honorable Orrin G. Hatch
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The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate

The Honorable James M. Jeffords
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The Honorable Edward M. Kennedy
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Committee on Agriculture
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The Honorable William F. Goodling
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The Honorable William L. Clay
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Committee on Education and the Workforce
House of Representatives

The Honorable Henry J. Hyde
Chairman
The Honorable John Conyers, Jr.
Ranking Minority Member
Committee on the Judiciary
House of Representatives

B-276220

Executive Summary

Purpose

During congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether enough farmworkers would be available to meet the needs of agriculture after the act's new constraints on foreign workers' ability to enter the country were implemented. The H-2A nonimmigrant guestworker program provides a way for U.S. agricultural employers to bring nonimmigrant foreign workers into the United States to perform seasonal agricultural work on a temporary basis when domestic workers are unavailable.¹ During fiscal year 1996, agricultural employers used the H-2A program to bring in about 15,000 workers, less than 1 percent of the U.S. agricultural field workforce.

The Congress asked whether the H-2A guestworker program could provide a sufficient supply of agricultural workers in the event of a significant farm labor shortage. As a result, the 1996 law, included in the Omnibus Consolidated Appropriations Act, 1997, directed GAO to review various aspects of the H-2A program.² This review addresses a number of issues, including (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both at present and if a significant number of nonimmigrant guestworkers is needed in the future.

Background

The Immigration Reform and Control Act of 1986 created the current program, commonly referred to as the "H-2A" program, under which employers may bring workers into the country on a temporary, nonimmigrant basis. The purpose of the H-2A program is to ensure agricultural employers an adequate labor supply while also protecting the jobs, as well as the wages and working conditions, of domestic farmworkers. Under the program, agricultural employers who anticipate a shortage of domestic workers can request nonimmigrant foreign workers. The Department of State issues nonimmigrant visas for H-2A workers only after the Department of Justice, through its Immigration and Naturalization Service (INS), has approved the employer's petition for authorization to bring in workers. Justice does not approve the petition until the Department of Labor has approved the employer's application for

¹See 8 U.S.C. 1101(a)(15)(H)(ii)(a).

²Division C of the Omnibus Consolidated Appropriations Act, 1997 (P.L. 104-208). The Conference Report for the Agricultural Rural Development, FDA Appropriation Act of 1997 (P.L. 104-726) also mandated that GAO study the H-2A program.

certification that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by bringing in guestworkers. The Department of Agriculture (USDA) acts in an advisory role that includes conducting wage surveys for Labor's determination of the minimum wage rates to be paid by employers of H-2A workers—the so-called “adverse effect wage rate”—which is designed to mitigate any negative effect employment of these workers may have on domestic workers similarly employed.

Labor is also responsible for ensuring that agricultural employers comply with their contractual obligations to H-2A workers and for enforcing labor laws covering domestic workers, including the wage, housing, and transportation provisions of the Migrant and Seasonal Agricultural Worker Protection Act. For example, workers who complete 50 percent of the contract period are due reimbursement for transportation from the place of recruitment, while those who complete the entire contract are guaranteed work or wages for a minimum of three-quarters of the contract period and reimbursement for transportation home. Agricultural employers must provide the same minimum wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in “corresponding employment.”

Results in Brief

A sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future. There appears to be no national agricultural labor shortage now, but localized labor shortages may exist for specific crops or geographical areas. Although many farmworkers—an estimated 600,000—are not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers. INS expects limited impact from its enforcement activities because of the prevalence of fraudulently documented farmworkers and INS' competing enforcement priorities. In fiscal year 1996, less than 5 percent of the 4,600 INS worksite enforcement efforts were directed at agricultural workplaces. INS conducts enforcement efforts largely in response to complaints, and it receives few complaints about agricultural employers. INS officials in both field and headquarters positions stated unanimously that operational impediments prevented the agency from significantly reducing the number of unauthorized farmworkers. The prevalence of unauthorized and fraudulently documented farmworkers does, however, leave individual growers vulnerable to sudden labor shortages if INS does target its enforcement efforts on their establishments.

Although few agricultural employers seek workers through the H-2A program, those that do are generally successful in obtaining foreign agricultural workers on both a regular and an emergency basis. During fiscal year 1996 and the first 9 months of fiscal year 1997, Labor approved 99 percent of all H-2A applications. However, both employers and Labor officials have difficulty meeting time frames specified by law and regulation. And because Labor does not collect key program management information, it is unable to determine the extent and cause of missed time frames. In addition, the multiple agencies and levels of government implementing the program may result in redundant oversight and confusion for both employers and workers.

While INS enforcement efforts are unlikely to create a significant increase in demand for H-2A workers, changes in program operations could improve the ability of growers to obtain workers when needed—whether or not a nationwide labor shortage exists—and better protect the wages and working conditions of both domestic and foreign workers. These include reducing both the time required to process applications and the period of time the worker must be employed to qualify for a wage guarantee.

Principal Findings

A Widespread Farm Labor Shortage Is Unlikely in the Near Future, Although Localized Shortages Are Possible

A widespread farm labor shortage does not appear to exist now and is unlikely in the near future. Although there is widespread agreement that a significant portion of the farm labor force is not legally authorized to work, INS enforcement activity is unlikely to generate significant farm labor shortages.

Ample Supplies of Farm Labor Appear to Be Available in Most Areas

Although data limitations make the direct measurement of a labor shortage difficult, GAO's own analysis suggests, and many farm labor experts, government officials, and grower and farm labor advocates agree, that a widespread farm labor shortage has not occurred in recent years and does not now appear to exist. For example, GAO's analysis of the monthly and annual unemployment rates of 20 large agricultural counties—those that contain large amounts of fruit, tree nut, and vegetable production in dollar value—found that 13 counties maintained annual double-digit unemployment rates, and 19 had rates above the

national average during 1994 through 1996. As of June 1997, 11 counties still exhibited monthly unemployment rates double the national average of 5.2 percent, and 15 of the 20 counties had rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average. These high unemployment rates generally existed over the entire year, even during peak agricultural periods. The lack of evidence of widespread farm labor shortages, however, does not preclude the existence or potential for more localized shortages in a specific crop or remote geographic area.

INS Enforcement Efforts Are Unlikely to Significantly Reduce the Number of Unauthorized Farmworkers

GAO estimates that approximately 600,000 farmworkers in the United States lack legal authorization to work. However, INS officials around the country were unanimous in their statements that they do not expect their enforcement efforts to have any general impact on the supply of farm labor either nationally or regionally, given the large number of fraudulently documented farmworkers and competing enforcement priorities. Most of INS' investigation resources are focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity, and on detecting and deterring fraud and smuggling. In fiscal year 1996, 304 INS staff years were devoted to noncriminal investigations, including worksite enforcement for all industries—an average of about 6 INS staff years per state. Fewer than 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services. Furthermore, fewer than 700 workers, about 4 percent of all employees at those worksites, were arrested during INS' enforcement operations at these worksites. INS officials do not expect a significant increase in enforcement efforts directed at agriculture in the near future.

The prevalence of such a large number of unauthorized and fraudulently documented farmworkers leaves individual employers vulnerable to sudden labor shortages if INS targeted enforcement efforts at their establishments. Although INS efforts are under way to improve employers' ability to identify fraudulent documents, these efforts are still in the early stages and are not likely to have any significant impact on the availability of illegally documented farmworkers in the near future. The degree to which these initiatives, if fully implemented, would affect the number of unauthorized workers and the supply of agricultural workers is unknown; full implementation would require legislative action.

Although Employers Obtain H-2A Workers, Applications Are Not Processed in a Timely Manner

Agricultural employers receive certification from Labor for most of the workers they request through the H-2A program on both a regular and an emergency basis, regardless of the skill level required. Labor's Employment and Training Administration (ETA) issued certifications for 99 percent of the 3,689 applications filed nationwide from October 1, 1995, through June 30, 1997, and certified all but 11 percent of the 41,549 job openings requested on these applications. However, Labor does not always process applications on time, which makes it difficult to ensure that employers will be able to get workers when they need them. The H-2A program has statutory and regulatory deadlines, such as a requirement that employers file an application for workers at least 60 days before they are needed and that Labor issue a decision on certification of a labor shortage at least 20 days before the date of need. GAO's analysis showed that in fiscal year 1996, at least one-third of Labor's certifications missed the statutory 20-day deadline, limiting the time available to process visas through INS and the State Department. Although no data were available on how many employers failed to obtain the required workers by the date of need, GAO identified some applications that were not even certified by Labor until after the date of need.

Lack of Data Makes It Difficult to Monitor Timeliness and Oversee Program

Labor does not collect data necessary to determine the extent and cause of its failure to meet regulatory and statutory deadlines for both regular and emergency applications. A program official told us that while the agency does not maintain data on timeliness, he will hear from agricultural employers about any missed deadlines. Without adequate data, GAO could not corroborate Labor's explanation that the delay in meeting the certification deadline was due to reasons outside the control of the office responsible for certifications, such as the time required to inspect farmworker housing and employers' failure to provide in a timely manner the required documentation of efforts to recruit domestic workers and of health care coverage.

INS Involvement in Petition Approval Adds Little Value to Process

After receiving Labor's certification, INS must approve an employer's petition for H-2A visas before workers can apply to the State Department for visas, a procedure that can add up to 3 weeks to processing time. INS officials agreed, however, that the INS petition approval process adds little value to the process because petitions for H-2A visas, unlike other visa petitions, do not generally identify individual workers. Therefore, INS examiners only check to make sure that Labor has issued a certification and that the employer has submitted the correct fees for the petition.

Moreover, this verification that Labor has issued a certification is done again by the State Department, according to officials at the two consulates—Monterrey and Hermosillo, Mexico—that process almost all H-2A visas.

Requirement to Request Workers 60 Days in Advance Is Problematic

Even if all processing deadlines are met, agricultural employers, their advocates, and state employment officials told us that the workers may not be available when needed. This is because the weather and other factors make it hard to estimate 60 days in advance when workers will be needed. This is especially true for crops with short harvest periods. This difficulty may help explain why many employers were late filing applications for certification with Labor: 42 percent of all applications in fiscal year 1996 were filed late. The 60-day deadline may also encourage employers to estimate the earliest possible date, which can have negative consequences for workers who arrive before the employer has work for them: These workers are then left with no income until work is available.

Insufficient Information and Multiple Agencies Administering H-2A Program Can Make Program Participation More Difficult

Employers, advocates, and agency officials expressed frustration about the poor information on H-2A procedures. Labor's handbook on the H-2A Labor certification process includes information that is outdated, hard to understand, and incomplete. Program participants can also be confused by the multiple agencies and levels of government involved in the H-2A program, which fosters redundant agency oversight and the inability to determine compliance with program requirements. In some states, for example, employer-provided farmworker housing is subject to federal, state, and local housing regulations and must be inspected by multiple agencies. Some redundancy may also result in employers misunderstanding program requirements. Employers and employer and labor advocates in California, for example, told GAO that tents for farmworkers were effectively prohibited because they had to be heated and cooled. However, both federal and state housing officials said that tents are permitted and that air-conditioning is not required.

Worker Protection Provisions Are Difficult to Enforce

Violations of H-2A worker protection provisions, including the requirement that foreign guestworkers be guaranteed wages equivalent to at least three-quarters of the amount specified for the entire contract period, are difficult to identify and enforce. H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers, and they are unlikely to complain about worker protection violations, such as the

three-quarter guarantee, fearing they will lose their jobs or will not be hired in the future. Labor, for example, received no complaints from workers employed by H-2A employers in fiscal year 1996, even though GAO's analysis suggests it is likely that some workers did not receive their guaranteed wages. In general, Labor officials reported that it is hard to ensure that abusive employers do not participate in the H-2A program.

Labor officials also noted operational impediments in enforcing these protections. For example, the three-quarter guarantee is only applicable at the end of the contract period, and H-2A workers must leave the country soon after the contract ends. Labor officials said that monitoring the three-quarter guarantee is difficult because they cannot interview workers after they return to Mexico to confirm their work hours and earnings. These enforcement difficulties create an incentive for less scrupulous employers to request contract periods longer than necessary: If workers leave the worksite before the contract period ends, the employer is not obligated to honor the three-quarter guarantee or pay for the workers' transportation home. And if a worker abandons the contract, it can be very difficult to determine whether he or she has left the country or is instead remaining and taking jobs from domestic workers.

The H-2A program requires that agricultural employers provide H-2A workers the same minimum wages, benefits, and working conditions as those provided to domestic workers employed in "corresponding employment." Current Labor regulations guarantee wages for the first week of work to domestic workers who are referred to agricultural employers through the interstate clearance system of the Employment Service,³ unless the employer informs the state employment service of a delay in the date of need at least 10 days in advance. However, no provisions are made to provide the same guarantee to H-2A workers, resulting in a disparity of treatment and the potential for personal hardship for foreign workers.

Agencies Could Handle a Major Increase in Program Workload With Additional Resources

In the unlikely event of a national farm labor shortage, Labor, INS, and state employment service officials told GAO they could handle an unanticipated, major, short-term increase in program workload. In the event of a significant, sustained national increase in the demand for agricultural guestworkers, however, Labor and INS officials agreed that they would need additional resources to effectively process the increased number of

³The U.S. Employment Service, part of Labor's ETA, is a national system of public employment service offices, supported by federal funds and operated by the states, which provide employment services to individuals seeking employment and to employers seeking workers.

applications. Although the administration's Domestic Policy Council has met with officials from Labor, INS, USDA, and State to address this issue, no proposals are currently available for review.

Recommendations

To improve the H-2A program's ability to meet the needs of agricultural employers while protecting the wages and working conditions of farmworkers, GAO is making recommendations to the Congress, the Attorney General, and the Secretary of Labor. These recommended actions would improve service to employers by allowing them to request workers 45 days in advance of need rather than requiring 60-day notice. This shorter time period could be met by (1) removing INS from the petition approval process and (2) having Labor more closely monitor its performance in meeting deadlines. The recommendations also maintain protection for domestic workers by keeping the same number of days allowed for recruitment of domestic workers prior to certification of a labor shortage, and better protect H-2A workers by extending to them the same guarantee of first-week wages that now applies to domestic workers in corresponding employment and by revising the regulations regarding the three-quarter wage guarantee. Other recommendations would improve service to both employers and workers by providing them better information about the program and consolidating enforcement responsibilities within Labor.

Agency Comments and GAO's Evaluation

Labor, the State Department, and USDA all commented on a draft of this report. Labor and State, agencies responsible for implementing GAO's recommendations, generally agreed with the report's findings and most of its recommendations. For example, Labor concurred with GAO's recommendation that the Attorney General delegate authority for approval of H-2A visa petitions from INS to the Secretary of Labor. In contrast, USDA, which serves in an advisory capacity, while agreeing with some of GAO's findings and recommendations, submitted detailed comments on statements, conclusions, and recommendations presented in the draft report that it believed were either inaccurate or required clarification. (See apps. VIII, IX, and X for Labor's, State's, and USDA's comments, respectively.)

Labor specifically agreed with GAO's finding that "a farm labor shortage does not now exist and is unlikely in the foreseeable future." However, it also contended that there is evidence of a farm labor surplus, and also

noted the potential for implementation of work requirements of the recent welfare reform legislation to provide agricultural labor.

Labor suggested two revisions to GAO's recommendations. Labor agreed that the structure of the three-quarter guarantee could result in employers overestimating the contract period in the expectation that less work and lower earnings toward the end of the contract period will encourage workers to "abandon" employment and, thereby, relieve the employer of the three-quarter guarantee and return transportation reimbursement obligations. While Labor agreed to evaluate possible solutions to this problem, it said that given fluctuations in the amount of work required during a growing season, applying the guarantee on an incremental basis may not be the most appropriate solution. Labor also suggested a revision to the recommendation regarding authority to suspend employers with serious labor standard or H-2A contract violations: The agency suggested that the authority should be extended to the Wage and Hour Division of the Employment Standards Administration rather than transferring it from ETA. GAO revised both recommendations accordingly.

Although USDA agreed with some of the draft report's findings, conclusions, and recommendations, it submitted detailed comments on aspects of the draft report that it believed were either inaccurate or require clarification. These comments can be grouped into several broad areas concerning GAO's analysis of (1) conditions in agricultural labor markets; (2) the magnitude and consequences of INS enforcement operations; (3) H-2A program operations, specifically late filings of applications; and (4) the effectiveness of protections covering both domestic and H-2A workers, specifically the three-quarter guarantee and the application processing deadlines. For example, although USDA did not explicitly disagree with the finding that widespread labor shortages do not currently exist, it contended that the central issue is whether an adequate supply of qualified labor is currently available to agricultural employers. Information provided by USDA does not alter GAO's assessment that the overwhelming weight of the evidence indicates that widespread farm labor shortages do not currently exist and are unlikely to occur in the near future. While USDA takes issue with individual components of GAO's analysis, the current quantitative analysis of key market indicators, coupled with the numerous in-depth interviews with agricultural employers, associations, and other interested parties, provides a reliable assessment of current farm labor market conditions.

Justice's INS, Labor, and USDA provided technical comments, which were included where appropriate. The Department of State had no substantive or technical comments.

Contents

Executive Summary		4
<hr/>		
Chapter 1		18
Introduction	Background	18
	Scope and Methodology	22
<hr/>		
Chapter 2		24
No Widespread	Local Labor Shortages Are Possible, but No National Agricultural	24
Agricultural Labor	Labor Shortage Appears to Exist	
Shortage Is	INS Enforcement Efforts Are Not Likely to Significantly Reduce	30
Anticipated	the Availability of Agricultural Labor	
<hr/>		
Chapter 3		38
H-2A Program Can Be	Statutory and Regulatory Deadlines for H-2A Process	38
Improved to Better	Employers Receive Labor Certification for Most of the Workers	44
Meet the Needs of	They Request	
Agricultural	Completing Certification and Visa Processing by Date of Need	46
Employers and	May Not Provide Workers When Needed by Employers	
Workers	Labor Often Issues Certifications After the Date of Need	46
	INS Petition Approval Process Can Increase Program Processing	48
	Time	
	State Department Has Processed Substantially More H-2A Visas	50
	in Recent Years	
	Involvement of Multiple Levels of Government and Agencies May	53
	Result in Redundant Oversight Activities and Participant	
	Confusion	
	Worker Protection Provisions Under H-2A Program Hard to	58
	Enforce	
	H-2A Workers Do Not Receive Same Guarantee for Wages	62
	Provided to Domestic Workers	
	Questions About Location of Enforcement Responsibility Within	62
	Labor	
	Sustained Increase in Demand for Guestworkers Would Require	63
	Additional Agency Resources	

Chapter 4		64
Conclusions and Recommendations	Conclusions	64
	Recommendations	67
Chapter 5		69
Agency Comments and Our Evaluation	Labor Stressed Existence of Agricultural Labor Surplus	69
	USDA Had Multiple Concerns With Report Findings, Conclusions, and Recommendations	70
Appendixes	Appendix I: Primary Congressional Contacts in Addition to Report Addressees	80
	Appendix II: Objectives, Scope, and Methodology	81
	Appendix III: Economic Data on U.S. Farmworkers and Agricultural Production	92
	Appendix IV: Characteristics of H-2A Participants	99
	Appendix V: INS Worksite Enforcement Activities, Fiscal Year 1996	107
	Appendix VI: Stakeholder Perspectives on Worker Protection Requirements Under H-2A Program	111
	Appendix VII: Appeal Rights During the H-2A Process	113
	Appendix VIII: Comments From the Department of Labor	114
	Appendix IX: Comments From the Department of State	121
	Appendix X: Comments From the U.S. Department of Agriculture	122
	Appendix XI: GAO Contacts and Staff Acknowledgments	144
Related GAO Products		148
Tables	Table III.1: Annual and Monthly Unemployment Rates for 20 Counties With Significant Production in Fruits, Tree Nuts, and Vegetables, 1994-96 and June 1997	93
	Table III.2: Food Stamp Waiver and Labor Surplus Area Designations for 20 Counties With Significant Production in Fruits, Tree Nuts, and Vegetables, 1997	94
	Table III.3: Average Hourly Wages of Agricultural Workers, 1989-96	96
	Table III.4: Average Hourly Piece-Rate Wages of Agricultural Workers, 1989-95	97

Table III.5: Total Annual Acreage, Tonnage and Dollar Value of National Fruit and Vegetable Production, and Numbers of Workers Employed, 1986-97	98
Table IV.1: H-2A Workers Entering the United States, by Country of Origin, Fiscal Year 1987-96	100
Table IV.2: Number and Result of Applications for H-2A Certifications, by Region, Fiscal Year 1994-97	104
Table V.1: INS District Offices, by Region	110

Figures

Figure 2.1: INS Staff Years by Type of Investigation, Fiscal Year 1996	32
Figure 3.1: H-2A Process for Obtaining Permission to Bring in Foreign Workers	40
Figure 3.2: Time Requirements for Applying for Agricultural Workers Under the H-2A Program	43
Figure 3.3: Country of Origin for H-2A Workers Has Shifted From Jamaica to Mexico, 1987-96	45
Figure 3.4: Number of H-2A Visas Processed, Fiscal Years 1987-97	50
Figure 3.5: Multiple Agencies Enforce Farmworker Protections in New York	55
Figure II.1: Terms of the Work	82
Figure IV.1: Distribution of Applications and Workers Certified, by Region, Fiscal Year 1996	103
Figure IV.2: Comparison of Age Distribution of Domestic Workers With H-2A Workers at a Major H-2A Employer, Fiscal Year 1996	106
Figure V.1: INS Worksite Enforcement Activities Completed at Agriculture-Related Employers, October 1996-July 1997	108

Abbreviations

AEWR	adverse effect wage rate
BLS	Bureau of Labor Statistics
CLASS	Consular Lookout and Support System
ESA	Employment Standards Administration
ETA	Employment and Training Administration
EVP	Employment Verification Pilot
ICS	Interstate Clearance System
INS	Immigration and Naturalization Service
IIRIRA	Illegal Immigration Reform and Immigration Responsibility Act of 1996
IRCA	Immigration Reform and Control Act
JEVP	Joint Employment Verification Pilot
MSPA	Migrant and Seasonal Agricultural Worker Protection Act
NASS	National Agricultural Statistics Service
NAWS	National Agricultural Workers Survey
OIG	Office of Inspector General
OSHA	Occupational Safety and Health Administration
RAW	Replenishment Agricultural Worker
SAW	Special Agricultural Worker
SESA	state employment service agency
SSA	Social Security Administration
USDA	U.S. Department of Agriculture
WHD	Wage and Hour Division
WICLO	West Indies Central Labour Organisation

Introduction

During congressional deliberations on the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, concerns surfaced about whether there would be enough farmworkers to meet the needs of the agricultural industry after the act's new constraints on foreign workers' ability to enter the country were implemented. The H-2A nonimmigrant guestworker program provides a way for U.S. agricultural employers to import nonimmigrant foreign workers to perform seasonal agricultural work on a temporary basis when domestic workers are unavailable.⁴ During fiscal year 1996, agricultural employers used the H-2A program to import about 15,000 workers, less than 1 percent of the agricultural field labor force.⁵

The Congress asked whether the H-2A guestworker program could provide a sufficient supply of agricultural workers if a significant farm labor shortage occurred. As a result, the 1996 law, included in the Omnibus Consolidated Appropriations Act, 1997, directed us to review various aspects of the H-2A program. These issues are included in two general objectives: (1) the likelihood of a widespread agricultural labor shortage and its impact on the need for nonimmigrant guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both now and if a significant number of nonimmigrant guestworkers is needed in the future. (See app. I for a list of primary congressional contacts in addition to the report addressees and app. II for a detailed listing of the questions agreed upon in discussions.)

Background

Throughout the 20th century, the Congress has authorized numerous programs to allow U.S. agricultural employers to use foreign temporary guestworkers in the event of a domestic labor shortage. For example, during World War I, the Congress authorized a temporary farm labor program to replace workers who were in the military; that program admitted almost 77,000 Mexicans to the United States. During a similar labor shortage created by World War II, the Congress authorized a program to bring Mexican guestworkers, called "braceros," to the United States. The Bracero program operated under a series of legislative

⁴See 8 U.S.C. 1101(a)(15)(H)(ii)(a).

⁵Estimates of the size of the agricultural workforce differ. As of July 1997, the Department of Agriculture (USDA) reported about 1.4 million workers employed on farms. This includes both field and livestock workers hired directly and from contractors. The Commission on Agricultural Workers noted in November 1992 that a reasonable estimate would be 2.5 million workers in the United States performing farmwork at some time during the course of a year. Using its own and USDA data, the National Agricultural Workers Survey estimated that there are about 1.6 million field workers. See *A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services* (Washington, D.C.: U.S. Department of Labor, Apr. 1997), p. 31.

authorizations from 1942 to 1964, bringing in between 4 million and 5 million workers for the nation's farms, primarily in the western United States. While the Bracero program was still in effect, the Immigration and Nationality Act of 1952 (P.L. 82-144) authorized a guestworker program that included agricultural workers, which is known as "H-2" after the section of the law. Similar in structure to the Bracero program, the H-2 program was enacted as a permanent program and was primarily used by agricultural employers in the east to contract with Caribbean workers.

The Immigration Reform and Control Act of 1986 (IRCA) divided the H-2 program into two visa categories: the H-2A program for agricultural employers and the H-2B program for nonagricultural employers.⁶ The H-2A program allows employers to bring in foreign workers to "perform agricultural labor or services . . . of a temporary or seasonal nature." The purpose of the H-2A program is to ensure agricultural employers an adequate labor supply while also protecting the jobs, as well as the wages and working conditions, of domestic farmworkers. Under the program, agricultural employers who anticipate a shortage of domestic workers can request nonimmigrant foreign workers.⁷ The Department of Justice authorizes the State Department to issue nonimmigrant visas for H-2A workers only after the Department of Labor certifies that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the use of guestworkers. USDA conducts surveys and acts in an advisory role to Labor in Labor's determination of the minimum wage rates to be paid by employers of H-2A workers—the so-called "adverse effect wage rate"—which are designed to mitigate any adverse effect the employment of these workers may have on domestic workers similarly employed.

Federal agencies are responsible for protecting both H-2A and domestic farmworkers from being exploited by agricultural employers. Labor's Wage and Hour Division (WHD), which is part of the Employment Standards Administration (ESA), is responsible for ensuring that agricultural employers comply with the contractual obligations that apply to H-2A workers, including wages, benefits, and working conditions. Since agricultural employers must offer at least the same working conditions to willing domestic workers, WHD must also ensure compliance for domestic workers employed in "corresponding employment."

⁶The H-2B program allowed employers to import foreign workers to perform nonagricultural temporary or seasonal service or labor.

⁷The procedures of the H-2A program are very similar to the operations of the agricultural provisions of the former H-2 program.

WHD also enforces additional protections afforded to domestic farmworkers by the Migrant and Seasonal Agricultural Worker Protection Act (MSPA), which establishes basic protections for domestic migrant and seasonal farmworkers regarding wages, housing, and transportation.⁸ MSPA requires that employers notify prospective workers of the wages and working conditions before they are hired. MSPA also requires that housing provided for workers must meet certain minimum standards for health and safety, and that vehicles in which workers are transported meet certain standards for safety.

Labor's Occupational Safety and Health Administration (OSHA) is generally responsible for regulating workplace safety and health, including the establishment of mandatory standards for temporary labor camps and for permanent migrant farmworker housing constructed on April 3, 1980, or later. OSHA issued a national field sanitation standard in 1987 that required agricultural employers to provide field laborers, at no cost, drinking water, toilets, and handwashing facilities. In those states that operate their own safety and health programs under federal OSHA approval, and which have decided to retain enforcement authority over field sanitation, the state OSHA office enforces provisions of the field sanitation standard.⁹ In February 1997, Labor transferred responsibility for enforcing the field sanitation standard in states without state safety and health programs from OSHA to WHD.

The Immigration and Naturalization Service (INS), in addition to admitting qualified guestworkers under the H-2A program, is responsible for protecting domestic workers by ensuring that (1) foreign workers do not enter the United States illegally and (2) U.S. employers do not hire illegal workers. Within INS, border management is largely the responsibility of the Border Patrol and Investigations, while special agents throughout the country are responsible for identifying, apprehending, and expelling illegal workers, and for sanctioning employers who knowingly hire foreign workers who are not authorized to work in this country.

With the passage of IRCA in 1986, it became illegal for employers to knowingly hire people who are not authorized to work in the United

⁸Foreign farmworkers employed under the H-2A program are not covered by MSPA.

⁹The Occupational Safety and Health Act of 1970 allows states to operate their own safety and health programs as long as they are determined by OSHA to be at least as effective as the federal OSHA program. Currently, 25 states operate their own programs to enforce at least some OSHA standards. However, after February 1997, only 14 states and territories retained enforcement responsibility for field sanitation standards.

States.¹⁰ All employees hired after November 6, 1986, regardless of citizenship, are required to show employers certain documents to establish both identity and employment eligibility. Employers, in turn, must verify the identity and employment eligibility of everyone they hire. Employers may not, however, discriminate against individuals on the basis of national origin or citizenship. INS's Worksite Enforcement program enforces this provision. INS investigations special agents and Border Patrol officers investigate employers, inspect eligibility verification, determine the nature and degree of compliance, remove unauthorized aliens from the worksite, and can sanction employers who knowingly hire aliens unauthorized to work.

IRCA also established the Commission on Agricultural Workers to study the effects of the act on the agricultural industry, with special emphasis on perishable crop production.¹¹ The Commission was also asked to review a number of more specific questions regarding IRCA's impact, including the adequacy of the supply of agricultural labor in the United States, whether certain geographic regions need special programs or provisions to meet their needs for agricultural labor, and the extent to which the labor difficulties experienced by agricultural employers are related to the lack of modern labor-management techniques. The Commission in its 1992 report concluded that no new supplementary foreign worker programs were warranted at that time.¹² However, it also urged the continuation of adequate monitoring and analysis of the farm labor market to facilitate quick action if future shortages develop. Labor conducts the National Agricultural Workers Survey (NAWS) annually, which collects detailed information on the characteristics and work patterns of agricultural workers, including job history data used to estimate fluctuations in farm labor supply.

¹⁰Before IRCA was enacted, MSPA, which was enacted in 1983, prohibited migrant farmworker contractors from recruiting or employing illegal aliens.

¹¹"Perishable crops" is defined as "fruit, vegetable, and horticultural specialty production," a classification that includes the production of most labor-intensive crops. Fruit includes berries, grapes, citrus fruits, deciduous tree fruits, avocados, bananas, coffee, dates, figs, olives, pineapples, tropical fruit, and tree nuts. Vegetable includes all vegetables and melons grown in the open. Horticultural specialties includes bedding plants, bulbs, florists' greens, flower and vegetable seeds, flowers, foliage, fruit stocks, nursery stock, ornamental plants, shrubberies, sod, mushrooms, and vegetables grown under cover.

¹²Report of the Commission on Agricultural Workers, Commission on Agricultural Workers (Washington, D.C.: Nov. 1992).

The Immigration Act of 1990¹³ mandated the U.S. Commission on Immigration Reform to examine and make recommendations regarding the implementation and impact of U.S. immigration policy. In 1995, the Commission on Immigration Reform found a considerable oversupply of farmworkers throughout the country, with heavy unemployment even during peak harvest periods. As of September 1997, the Commission found that the agricultural labor market had not changed significantly. The Commission concluded that any new agricultural guestworker programs, particularly “those that seek to revisit the Bracero program,” are not needed, concluding that such programs expand rural poverty, and “are incompatible with the values of democratic societies worldwide.”¹⁴

Although neither the Commission on Agricultural Workers nor the U.S. Commission on Immigration Reform recommended new programs, considerable congressional interest in farm labor issues continues. For example, in March 1996, the House rejected legislation that would have moved the H-2A program from Labor to the Justice Department and replaced the H-2A program’s certification requirements with provisions permitting agricultural employers to attest or state that a labor shortage existed in their area and that employing temporary foreign guestworkers would not adversely affect domestic workers. This legislation would also have modified the program’s housing provisions and withheld portions of guestworkers’ wages to be paid upon the workers’ return to the country of origin. The House also rejected another amendment that would have transferred the H-2A program to Justice, in addition to shortening filing and recruitment times and capping the program at 100,000 workers. Similar legislation has been submitted in both houses of the current Congress, but no action had been taken as of December 31, 1997.

Scope and Methodology

To address the objectives of this review, we collected documents and interviewed officials from the Departments of Labor, Justice, State, and Agriculture (USDA) and the Commission on Immigration Reform. We interviewed state health department and employment service officials in the three states that used the most H-2A workers in fiscal year 1996—North Carolina, Virginia, and New York—and in the state producing the largest dollar value in agriculture—California. We also interviewed numerous agricultural employers and agricultural employer association representatives; H-2A and non-H-2A farmworkers; and farm labor

¹³See P.L. 101-649, sec. 141.

¹⁴U.S. Commission on Immigration Reform, *Legal Immigration: Setting Priorities* (Washington, D.C.: U.S. Commission on Immigration Reform, 1995), p. 173.

advocates, including unions. We analyzed data from INS, the Departments of Labor and State, grower associations, state employment service offices, and selected state unemployment insurance programs. We also consulted with methodological and subject area experts, such as agricultural economists, immigration and labor experts, and policy analysts, and reviewed literature on immigration and agricultural labor markets. We conducted our review from April 1997 to September 1997 in accordance with generally accepted government auditing standards. (See app. II for more detailed information on our scope and methodology.)

No Widespread Agricultural Labor Shortage Is Anticipated

A sudden widespread farm labor shortage requiring the importation of large numbers of foreign workers is unlikely to occur in the near future. There appears to be no national agricultural labor shortage now, although localized labor shortages may exist for individual crops and in specific geographical areas. In addition, while a significant percentage of the U.S. farm labor workforce is not legally authorized to work in the United States, INS does not expect its enforcement activities to significantly reduce the aggregate supply of farmworkers.

Local Labor Shortages Are Possible, but No National Agricultural Labor Shortage Appears to Exist

Although the limitations of available data make the direct measurement of a labor shortage difficult, our analysis suggests, and many farm labor experts, government officials, grower and farm labor advocates agree, that a widespread farm labor shortage has not occurred in recent years and does not currently exist. However, the lack of evidence of a widespread farm labor shortage does not preclude the potential for, or existence of, localized shortages particular to specific crops or geographic areas. Many grower advocates, USDA officials, and farm labor experts told us that a large proportion of the current agricultural labor supply is composed of workers who are not authorized for employment, leaving many agricultural employers vulnerable to potential labor shortfalls in the event of a concentrated or targeted INS enforcement effort. Many individual growers we interviewed concurred with this assessment, expressing concerns about the prospect of localized shortages resulting from intensified INS enforcement activities.

Limited Data Make Measurement of Labor Shortages Difficult

The limited data available make it difficult to directly measure a market imbalance such as a farm labor shortage.¹⁵ For example, it has been suggested that the analysis of job vacancy data could help identify those occupations where shortages exist, but the Bureau of Labor Statistics (BLS) no longer collects this information. Although Labor's Employment Service

¹⁵ A shortage can be defined as a situation in which the number of farm job vacancies persistently exceeds the number of farm labor job seekers at the current wage rate or with moderate wage increases. However, the assumptions made about the operation of a particular labor market will have implications for the concept of a farm labor shortage. For example, the simplest economic model of a labor market specifies that in the event of a shortage (an excess of jobs over available workers) market forces (rising wage rates) should work to eliminate that shortage. However, many economists believe that labor markets do not behave the same way as product (for example, shirts or fish) markets, and thus must be analyzed differently. (See Robert M. Solow, *The Labor Market as a Social Institution* (Cambridge, Mass.: Basil Blackwell, 1990).) A more dynamic model of labor market adjustment would acknowledge that employers may react in a variety of ways, not only possibly by increasing wages but also by increasing recruitment efforts or reducing production. An analysis of such dynamics can explain labor shortages if adjustment speed is slow or if there are barriers to adjustment. (See Malcolm S. Cohen, *Labor Shortages as America Approaches the Twenty-first Century* (Ann Arbor, Mich.: University of Michigan Press, 1996).)

does collect information on the number of workers seeking and obtaining employment in agriculture through referrals at individual state employment services, an agency official estimates that such activity accounts for less than 5 percent of all job placements in agricultural field work nationally.¹⁶ Regardless, job vacancy data alone would be insufficient to determine whether a labor shortage existed; they would need to be considered in conjunction with other labor market indicators.¹⁷

Other labor market indicators are consistent with the view that a widespread national farm labor shortage does not currently exist. For example, experts agree that sustained high unemployment rates generally signify that surplus labor is available and that persistently low unemployment rates can indicate a labor shortage. Although unemployment rates are available for states and counties, BLS does not construct unemployment rates for the agricultural industry for counties or all states, or for occupations such as agricultural field worker, so this connection in agriculture cannot be verified directly. In any case, employers could have difficulties filling positions for a particular occupation even when a high unemployment rate exists.¹⁸

Rapidly rising hourly wages are also consistent with a labor shortage, and some hourly and piece-rate wage data are available for agricultural field workers from USDA and other sources. However, rising hourly wage rates may not always signify a labor shortage if, for example, workers are paid

¹⁶Between June 1995 and July 1996, the U.S. Employment Service received 188,139 applications at its state offices from workers classified as migrant and seasonal farmworkers. Of this number, 91,549 were referred to agricultural employment, and 64,847 of these workers were placed in jobs. See *The Annual Report of the U.S. Employment Service, Program Year 1995* (Washington D.C.: Department of Labor, June 1996), p. E-3.

¹⁷For example, if an occupation had a high vacancy rate and a high unemployment rate it could mean that insufficient information about the occupation (for example, wage rates, location of employment, and skill level) was preventing workers and employers from being matched. It could mean that there were rigidities in geographic mobility (for example, employment was located in inaccessible areas). See Cohen, *Labor Shortages as America Approaches the Twenty-first Century*, p. 12.

¹⁸For example, if an employer had to locate and interview many workers for a particular occupation before finding one with the appropriate skills and if workers could not easily search for this job, an occupational labor shortage could exist even with an area with an unemployment rate significantly above zero.

by piece rate, as is fairly common in the production of fruits, vegetables, and horticulture.¹⁹

Ample Supplies of Farm Labor Appear to Be Available in Most Areas

Most farm labor experts, government officials, and grower and labor advocates we interviewed agreed with our conclusion that agricultural employers in most of the United States have had adequate supplies of labor for many years and continue to do so. Our analysis is based on (1) the large number of illegal immigrant farmworkers granted amnesty in the 1980s, (2) persistently high unemployment rates in key agricultural areas, (3) state and federal designations of agricultural areas as labor surplus areas, (4) stagnant or declining wage rates as adjusted for inflation, and (5) continued investments by growers in agricultural production.

Farmworker amnesty provisions in IRCA resulted in the legalization of large numbers of foreign farmworkers, ensuring agricultural employers adequate supplies of farm labor during the mid-to late 1980s. Beginning in June, 1987, the Special Agricultural Worker (SAW) provisions of IRCA permitted foreign farmworkers with 90 or more days of qualifying work in agriculture to apply for legal status. The SAW program received nearly 1.3 million applications during its first 18 months of operation, over half of them in California alone, resulting in the legalization of a significant portion of the U.S. agricultural labor supply.²⁰ Available data suggest that SAW workers have made up a significant, albeit declining, proportion of the U.S. agricultural labor market since the late 1980s, falling from 33 percent of all farmworkers in fiscal year 1989 to 19 percent in fiscal year 1995.²¹

¹⁹According to traditional economic theory, if the demand for labor exceeds supply, wages will be bid up by employers: thus, rapidly rising wages are consistent with a labor shortage. However, if, for example, changes in production techniques or worker effort result in the individual employee becoming more productive, hourly rates could rise without the presence of a labor shortage even if farmworkers are paid under constant or falling piece rates. Piece-rate payment is fairly common among agricultural workers. NAWA estimated that for fiscal year 1995, about 24 percent of all field workers, who work primarily in fruits and vegetables, received a piece-rate form of compensation for at least part of their earnings.

²⁰IRCA provided agricultural employers additional protection from labor shortages through its Replenishment Agricultural Worker (RAW) provisions, which would have permitted employers to legally bring in foreign workers if Labor and USDA had determined that a labor shortage existed. The provision, in place for four fiscal years beginning in FY 1990 and expired in FY 1994, was never triggered, with both departments consistently agreeing that domestic labor supplies were adequate to meet agricultural employers' demands for such workers. The Commission on Agricultural Workers at the time also agreed with this assessment, reporting that "there [was] an oversupply of workers in most agricultural labor markets." Report of the Commission on Agricultural Workers (Washington D.C.: Nov. 1992).

²¹See A Profile of U.S. Farm Workers: Demographics, Household Composition, Income and Use of Services (Washington, D.C.: U.S. Department of Labor, Apr. 1997), p. 36.

Many agricultural areas have exhibited persistently high rates of unemployment over the last few years, suggesting that existing labor supplies were and continue to be more than adequate to meet agricultural employers' needs. Our analysis of recent annual and monthly unemployment rates of 20 agricultural counties—those that contain large amounts of fruit, tree nut, and vegetable production in dollar value—is consistent with this view.²² Of these 20 counties, 13 maintained annual double digit unemployment rates throughout 1994 through 1996. (For more detailed information, see table III.1.) As of June 1997, 11 counties exhibited monthly unemployment rates double the national average of 5.2 percent and 15 of the 20 counties displayed rates at least 2 percentage points higher than the national rate. Only two of the counties had unemployment rates below the June 1997 national average.²³

State responses to changes mandated by the recently enacted federal welfare reform legislation also suggest that many agricultural areas may currently be experiencing farm labor surpluses rather than shortages. Section 6(o) of the Food Stamp Act, as added by section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, provides that an individual is ineligible for the program if during the preceding 36-month period, he or she received benefits for 3 months while not working or participating in a work program for at least 20 hours per week. However, in an effort not to penalize food stamp recipients who reside in areas with limited employment opportunities, the Secretary of Agriculture may waive these provisions for any group of individuals in a requesting state if the Secretary determines that the area in which the individual resides is essentially a labor surplus area—has an unemployment rate of over 10 percent or does not have sufficient numbers of jobs to provide employment for the individuals. As of late July 1997, 42 states had applied for and received waivers from the Secretary of Agriculture for counties and other jurisdictions, including many agricultural areas. All of the 20 agricultural counties we analyzed received

²²As of 1992, the latest year for which detailed county data were available from USDA, these 20 counties accounted for over 50 percent of the dollar value of all fruit and tree nut production in the United States, 47 percent of the dollar value of all vegetables, and about 16 percent of the total national dollar value of nursery and greenhouse production.

²³Agriculture is a seasonal industry, so it is possible that some areas could have low unemployment rates during the labor-intensive part of the year, such as during harvest time, but still show high annual rates of joblessness. However, our analysis of monthly unemployment rates during this period showed high rates (above 7 percent) throughout the period January 1994 through June 1997 for most of the 20 counties.

at least partial waivers from USDA, and 18 received waivers covering their entire counties.²⁴ (For more detailed information, see table III.2.)

Cities, counties, and other jurisdictions also can be designated annually by Labor's Employment Service as "labor surplus areas." A labor surplus area must have an average unemployment rate at least 20 percent above the average national unemployment rate during the previous 2 calendar years or a rate of 10 percent or more during the previous 2 calendar years. Labor may also designate an area as surplus if it had unemployment rates of at least 7.1 percent for each of the 3 most recent months or projected unemployment of at least 7.1 percent for each of the next 12 months or has documentation that this has already occurred. Such designation confers preference in bidding on federal procurement contracts for firms that will locate contract work in those areas. As of August 1997, Labor had designated all of 13 and parts of 5 others of the 20 agricultural counties we analyzed as labor surplus areas. (See table III.2.)

Some experts cite evidence that agricultural wage rates adjusted for inflation (real wage rates) have declined in recent years, a trend that is also more indicative of a labor surplus than a labor shortage. Our analysis of agricultural wage data shows declining real wage rates. Since the late 1980s, annual average hourly wages for agricultural workers have been flat or have declined in real terms (see table III.3), and real annual average hourly wage rates for piece workers fell. (See table III.4.)²⁵ Declining or flat real wages also occurred as total employment in agriculture fell by 6 percent between 1986 and 1997 or, as shown in table III.5, 15.9 percent for total peak employment between 1987 and 1997, which also suggests the presence of farm labor surpluses rather than shortages.²⁶

²⁴California's Santa Barbara and San Diego counties received partial waivers. Of the 20 counties, 13 received full waivers under the 10 percent unemployment rate provision while 7 received full or partial waivers under the "insufficient jobs" provisions.

²⁵It should also be noted that for the period 1989-95, USDA's National Agricultural Statistics Service (NASS) data on hourly farm wages showed a smaller decline in real terms than that exhibited by the BLS average hourly wage rate for all nonagricultural workers—2.7 percent compared with 3.6 percent. However, the NAWS data on hourly wage rates, which, unlike NASS or BLS data, are based on the survey responses of workers rather than employers, showed an 8.5-percent decline over the same period. Some experts argue that the decline in real farm wages detected by both NASS and NAWS would be even greater if not for an increase in the minimum wage enacted during this period.

²⁶This trend should be interpreted with caution because it does not include agricultural employment obtained through farm labor contractors and because many agricultural labor markets experience considerable turnover. However, available evidence suggests, at a minimum, considerable underemployment in agriculture. NAWS data for 1995 show that, on a monthly basis, over 40 percent of all crop workers were not employed in agriculture over the entire year, even during peak periods. See *A Profile of U.S. Farm Workers: Demographics, Household Composition, Income and Use of Services*, p. 36.

One expert also noted that growers appear to continue to be investing in new farm production that will not bring returns for a number of years, suggesting a long-term confidence that agricultural labor would be available. Consistent with this belief, between 1989 and 1995, the last year for which data were available, acreage for fruits and tree nuts, vegetables, and nurseries (the more labor-intensive agricultural commodities) has increased by over 30 percent, with the dollar value of production and total production tonnage also rising by 52 percent and 30 percent, respectively. (See table III.5.)

Localized Labor Shortages May Exist in Individual Crops and for Specific Geographical Areas

The lack of evidence of widespread farm labor shortages does not preclude the existence or potential for more localized shortages in a specific crop or geographic area. Both growers and labor advocates described current difficulties in obtaining workers and concerns about future difficulties in certain areas. For example, both growers and farm labor advocates agreed that it was increasingly difficult to get domestic labor to work in some kinds of tobacco harvesting, although they disagreed on the cause of this development. Similarly, regional Labor officials suggested that it was likely that the geographic inaccessibility of some particularly remote agricultural areas such as in Nevada contribute to a longtime difficulty that they believed growers in those areas have had in obtaining domestic workers. Some growers, grower advocates, and USDA officials also expressed concern that the large number of workers not authorized to work left themselves or agricultural employers in their areas vulnerable to INS enforcement actions that could prove financially devastating to farm operations.

Opinions differ regarding solutions to localized labor shortages. Farm labor advocates and some government officials said that the supply of domestic labor is generally sufficient to meet the needs of U.S. agriculture. For example, some of them suggested that the implementation of the work requirements of the recent welfare reform legislation could serve as a potential source of labor for agricultural employers in some areas of the country. In other areas, they believed, many workers with farm labor experience could be drawn back to agricultural employment with fairly modest wage increases that would have little effect on consumer prices or

U.S. agricultural competitiveness.²⁷ Some employers we interviewed, however, stated that it is unlikely that many former welfare recipients would have the ability to be suitable farmworkers, particularly single mothers with young children requiring day care. Transportation from urban population centers to rural worksites was also cited as an impediment. Regarding wages, some employers were convinced that they could not be competitive if they raised wages.

INS Enforcement Efforts Are Not Likely to Significantly Reduce the Availability of Agricultural Labor

Although many farmworkers are not authorized to work in this country, INS officials do not expect their enforcement efforts to significantly reduce the availability of agricultural labor, either nationally or regionally. Law-abiding employers, in particular, are unlikely to be targeted for enforcement efforts, given INS' focus on apprehending criminal aliens and identifying employers that have engaged in criminal acts. Current enforcement efforts in agriculture are a small proportion of INS' total enforcement operations and result in few apprehensions. Conducting enforcement operations in agriculture is particularly resource-intensive. Enforcement officials in INS' Office of Investigations and Border Patrol around the country told us they do not plan to redirect their efforts from other enforcement activities to agriculture and do not expect to have any general impact on farmers' ability to harvest crops. They agreed, however, that a limited number of individual agricultural employers could be affected. In addition, efforts to increase employers' ability to identify fraudulent documents are not expected to have an immediate impact.

Many Farmworkers Are Not Authorized for Employment

Many grower advocates, USDA officials, and experts told us that a large and increasing proportion of the existing agricultural workforce is not authorized to work in this country. Data from the NAWS and our analysis of available data support this conclusion. The most recent NAWS found that 37 percent of all crop workers in 1995 were ineligible for employment—up

²⁷Changes in field worker wages appear to have a fairly small impact on consumer produce prices. For example, one estimate found that a 1-percent increase in real farm worker wages would increase the real costs of fruits and vegetables by about 0.4 percent. The study concluded that the long-term effect on retail prices of fruits and vegetables of removing all illegal farmworkers would be about 3 percent, with a 6-percent price increase in the short term. See Wallace Huffman and Alan McCunn, *How Much Is That Tomato in the Window? Retail Produce Prices Without Illegal Farmworkers* (Washington, D.C.: Center for Immigration Studies, Feb. 1996). However, the study also assumed that such unauthorized workers accounted for only 17 percent of the agricultural workforce, while current estimates from NAWS are 37 percent.

from 7 percent in 1989.²⁸ We estimate that approximately 600,000 farmworkers in the United States lack legal authorization to work, using the NAWS estimate of 37 percent of an agricultural field labor force of 1.6 million.

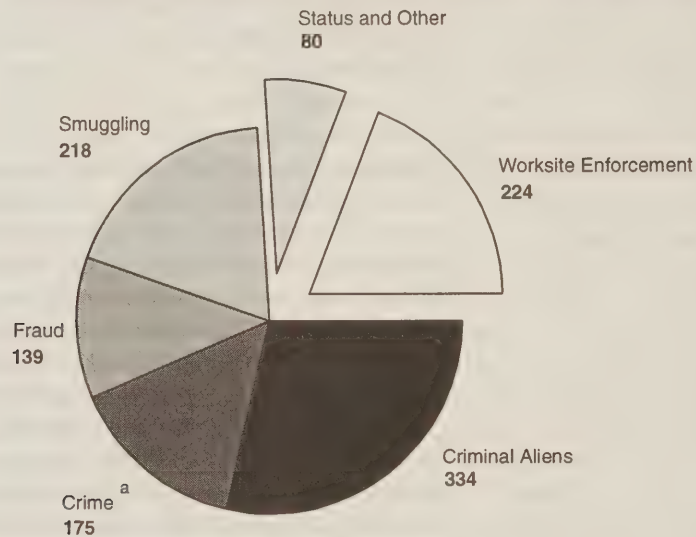
Few INS Enforcement Resources Are Directed at Worksite Enforcement

INS enforcement efforts are directed at preventing the illegal entry of people and identifying and apprehending illegal aliens within the United States. The majority of INS enforcement resources are devoted to preventing illegal entry, through the activities of the Border Patrol and the Inspections program. The Investigations program, which consumes fewer than one-fifth of INS enforcement resources, has the primary responsibility for identifying and apprehending those who are in the United States illegally. The Investigations program is also responsible for worksite enforcement, which includes enforcing the IRCA requirements that employers hire only U.S. citizens or authorized aliens and verifying their employment eligibility. Worksite enforcement consumed less than 4 percent of INS enforcement activities in fiscal year 1996. As shown in figure 2.1, most investigation resources are focused on identifying aliens who have committed criminal acts, including violent criminal alien gang and drug-related activity and detection and deterrence of fraud and smuggling. In fiscal year 1996, 304 staff years were devoted to noncriminal investigations, including worksite enforcement for all industries, or an average of about 6 INS staff years per state.²⁹ See app. V for the distribution of enforcement actions by INS region.

²⁸During that period, many of the workers legalized under the SAW program left agriculture and were replaced by workers who were not authorized to work. Of the 18 percent of all farmworkers who were in their first year of farm work during fiscal year 1995, 70 percent were unauthorized foreigners. See A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services.

²⁹Of the 304 staff years, 224 were devoted to worksite enforcement and the remaining 80 were devoted primarily to investigations and to apprehending "status" violations, for example, people who enter the country without going through border inspection but are not suspected of criminal behavior.

Figure 2.1: INS Staff Years by Type of Investigation, Fiscal Year 1996



^aConsists of participation on Violent Criminal Alien Gang and Drug-Related Activity task forces.

Few INS Enforcement Resources Are Directed Toward Agricultural Employers, and Few Agricultural Workers Are Arrested

INS officials told us that relatively few worksite enforcement resources are assigned to agriculture because almost all of their investigations are complaint-driven and they receive relatively few complaints from agricultural employers. Only about 5 percent of the 4,600 investigations completed in fiscal year 1996 involved employers in agricultural production or services. Furthermore, fewer than 700 workers, about 4 percent of all employees at those worksites, were arrested during INS' enforcement operations at these agricultural worksites. Even these numbers overstate the potential impact of INS activity on the need for H-2A workers because about 40 percent of these "agricultural" employers appear to be employed in industries that are not defined as agricultural under H-2A—landscapers, lawn maintenance firms, veterinarians, and kennels.

INS officials told us that these totals represent a reduction rather than an increase in INS enforcement efforts directed at agricultural employers. Until 1995, the Border Patrol played a significant role in worksite enforcement on farms through "farm and ranch checks." In fiscal year 1995, most of these resources were refocused on explicit border control

activities. This redirection of resources sharply reduced Border Patrol involvement in worksite enforcement—from approximately 30 percent of the total worksite enforcement resources to less than 5 percent. Border Patrol officials we talked with unanimously stated that with current resources their enforcement activities could have no significant impact on the agricultural workforce.

Law-Abiding Employers Unlikely to Be Targeted for Enforcement Efforts

Officials told us that agricultural employers who comply with the law are not likely to be targeted for enforcement efforts, given the need to focus on apprehending aliens and identifying employers who have engaged in criminal acts.³⁰ Law-abiding agricultural employers are not a priority target for INS inspections. INS develops a National Targeting Plan annually to target worksite inspections in response to complaints or leads. The fiscal year 1997 plan identifies 15 industries in which large numbers of illegal aliens have been employed, 2 of which hire farmworkers—“general farm and field crops” and “farm labor and management.” INS focuses primarily on employers in these 15 industries that are “abusive”—that is, employers known to have intentionally hired illegal workers; to have been involved in criminal violations like alien smuggling and harboring; to be repeat offenders; or to have subjected their employees to unlawfully substandard working conditions, housing, or wages. INS’ secondary focus is on abusive employers in industries, other than these 15, with histories of illegal immigration activity.

The fiscal year 1997 plan for worksite enforcement was based on leads or complaints, targeting employers that are the subjects of a concrete allegation or for which evidence exists of abuse or violations of IRCA. Major violators are employers in industries or locations with a history of reliance upon unauthorized labor who employ unauthorized foreign workers and violate criminal statutes, violate other regulatory requirements, or continually depend upon unauthorized labor. Officials told us that this emphasis on major violations can result in some investigations of specific farm operations, such as when there are allegations of farmworkers selling illegal substances but that more often result in more urban industries, such as manufacturing, becoming targets for investigations.

³⁰Law-abiding employers may hire workers not legally authorized to work in the United States because the law specifies that the employer is in violation of the law only to the extent that he or she knows that the worker is illegal. Employers who obtain the required documentation from workers may unknowingly hire illegal workers if the worker provides fraudulent documents.

Removing Illegal Aliens From Domestic Farm Labor Force Is Expensive and Difficult

INS enforcement officials we spoke with noted that logistical impediments make it difficult to apprehend and remove illegal aliens in general and that agricultural worksites present unique enforcement difficulties. These difficulties include the distance many agricultural worksites are from INS offices, the unusually large number of people necessary to conduct an enforcement operation on a farm, the need to obtain the necessary search warrants, the lack of perimeter fencing, and the considerable costs of processing and transporting apprehended illegal aliens.

Planning and conducting a major enforcement operation requires a significant number of human resources. To have enough personnel to conduct an operation, INS must often secure the assistance of other law enforcement agencies. For example, an enforcement operation we observed at a poultry processing facility involved 26 of the INS district's special agents, or almost 75 percent of them, as well as about 40 additional personnel from the state police department, the county sheriff's department, the city police force, a multiagency drug task force, and the U.S. Secret Service. Most agricultural worksites are located in rural areas, often at great distances from the field offices of the enforcement agencies, making the logistics of agricultural enforcement more time-consuming and costly than those conducted at more urban nonagricultural worksites. In one district, agents said that they were discouraged by agency management from pursuing worksite enforcement investigations that would involve travel costs and were instead encouraged to pursue cases in the local metropolitan area.

INS officers face a judicial requirement that can also complicate enforcement efforts at agricultural workplaces. Current law requires INS officers to have either the employer's permission or a search warrant before entering a farm or other outdoor agricultural operation to interrogate a person about his or her right to be in the United States. Enforcement agents told us that as farms become larger and more spread out, workers may be moved from one field to another during the course of a day and thus workers could be employed on fields in multiple counties for the same employer. This situation can require the procurement of multiple search warrants. In addition, according to an INS worksite enforcement supervisor, an operation in an open field would require more personnel to effectively secure the area and would probably involve chasing the "runners," many of whom would likely escape.

Once suspected illegal aliens are apprehended, they may be sent to a detention center for a hearing or, if they are offered and accept voluntary

departure, transported back to their home country. If an apprehended worker demands a hearing, INS district offices may incur additional detention costs like food and housing. Depending on where the apprehension takes place, transporting the worker can be costly. An assistant INS district director for investigations in the Southeast told us that he uses \$250 per person as a rule of thumb for estimating the cost of transportation of an illegal alien to Mexico, which does not include the salaries of any of the law enforcement personnel involved. Even if this assistant district director could apprehend several thousand illegal workers, his budget could not cover the transportation costs of voluntary departures. Another assistant district director from a midwestern district stated that his office's expenses are even higher: When his office apprehends illegal Mexican workers, it may have to pay for air transportation for those who agree to depart voluntarily.

Individual Employers Can Be Affected by INS Enforcement Actions Even If They Comply With Legal Requirements

Although most agricultural employers would not be targeted by INS for an enforcement action, a limited number of individual employers could be significantly affected in spite of their efforts to comply with legal requirements. Both individual employers and INS officials told us that high-quality fraudulent documents can be obtained so readily that it is virtually impossible for employers who are assiduously obeying the law to be certain that they are not hiring illegally documented workers. Agricultural employers told us that even though they suspected many of their employees were illegal, the employees possessed the required documents, and the employers had to hire them since they had no basis to assert that the documents were fraudulent. Moreover, employers said they were afraid of being sued for discrimination if they attempted to obtain further verification.

Efforts to Increase Employers' Ability to Identify Fraudulent Documents Will Have No Immediate Impact

Although efforts are under way to improve employers' ability to identify fraudulent documents, these efforts are unlikely to have a significant impact on the availability of unauthorized farmworkers who use such documents in the near future. In 1991 President Bush issued Executive Order 12781 authorizing demonstration projects of different changes in the existing document-based employment verification system. In response to this directive, INS established the Employment Verification Pilot (EVP), a voluntary test program that allows participating employers to verify electronically the employment eligibility of newly hired noncitizen workers. Currently, over 1,000 employers nationwide participate in EVP. Although well received by participating employers, the limitation of EVP to

noncitizen workers, rather than all workers, leaves open a door to fraud by unauthorized employees who claim falsely to be U.S. citizens on the Employment Eligibility Verification form (Form I-9). The next generation of verification pilot programs attempts to close this door by verifying all new hires. In August 1997, INS and the Social Security Administration (SSA) began the Joint Employment Verification Pilot (JEVP) program among a small group of employers in the Chicago area. J EVP involves an initial verification inquiry to SSA regarding all newly hired employees with, if necessary, a referral to INS for additional verification. The J EVP approach is also being used in the Basic Pilot currently being implemented by INS and SSA in the five states with the highest estimated population of unauthorized aliens (California, Texas, New York, Florida, and Illinois). The Basic Pilot is one of three verification pilots mandated by the Congress under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. With limited exceptions, these verification pilot programs are voluntary for employers.

Another effort to assist employers in screening unauthorized workers for employment is the development of a model counterfeit-resistant Social Security card. Such a card would permit quicker and more accurate identification of job applicants and employees who are unauthorized to work. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directed the Commissioner of Social Security to develop a prototype of a counterfeit-resistant Social Security card. SSA recently issued Report to Congress on Options for Enhancing the Social Security Card (SSA Pub. No. 12-002, September 1997) with accompanying prototypes for eight options for counterfeit-resistant Social Security cards. The Congress will consider these options and is awaiting a study by GAO. However, a counterfeit-resistant Social Security card is unlikely to be issued in the near future.

The degree to which these initiatives will affect the number of unauthorized workers and the supply of agricultural workers in general is unknown, and in any case, their effect is expected to be gradual. Both efforts are pilot projects now; the verification pilot has been conducted only on a limited basis. Even if both efforts prove successful, they would have to be authorized as permanent programs before they could be used routinely. In particular, electronic verification would have to be legislatively mandated as a permanent, mandatory part of the employment

verification system in order to have a major, long-term effect on the ability of unauthorized aliens to obtain employment in the United States.³¹

³¹Current law requires that the employer obtain a copy of the employee's documentation that he or she is a U.S. citizen or otherwise authorized to work and examine it to ensure that it is not an obvious forgery. However, the employer is not required to ensure that the information contained on the document is accurate.

H-2A Program Can Be Improved to Better Meet the Needs of Agricultural Employers and Workers

Labor currently certifies most of the workers that agricultural employers request through the H-2A program on both a regular and an emergency basis. However, while Labor does not generally track process timeliness, our analysis indicates that both Labor and employers have difficulty meeting deadlines for processing and filing program applications. INS' petition approval procedures also add time and cost to the process without adding significant value. In addition, the multiple agencies and levels of government involved in the H-2A program may result in redundant oversight and cause confusion for program participants. Furthermore, certain program requirements do not appear to be accomplishing their intended purpose. For example, the requirement that agricultural employers actively recruit domestic workers before bringing in guestworkers is often inadequate to protect employment opportunities for U.S. workers. Also, violations of provisions to guarantee that foreign guestworkers are paid for at least three-quarters of the agreed-upon contract period are difficult to identify and enforce, potentially reducing incentives for H-2A workers to remain with the employer for the entire contract period. In addition, in spite of regulations requiring that foreign and domestic workers receive the same minimum wages, benefits, and working conditions, domestic workers recruited through the Interstate Clearance System (ICS) have their wages guaranteed, but foreign workers do not.

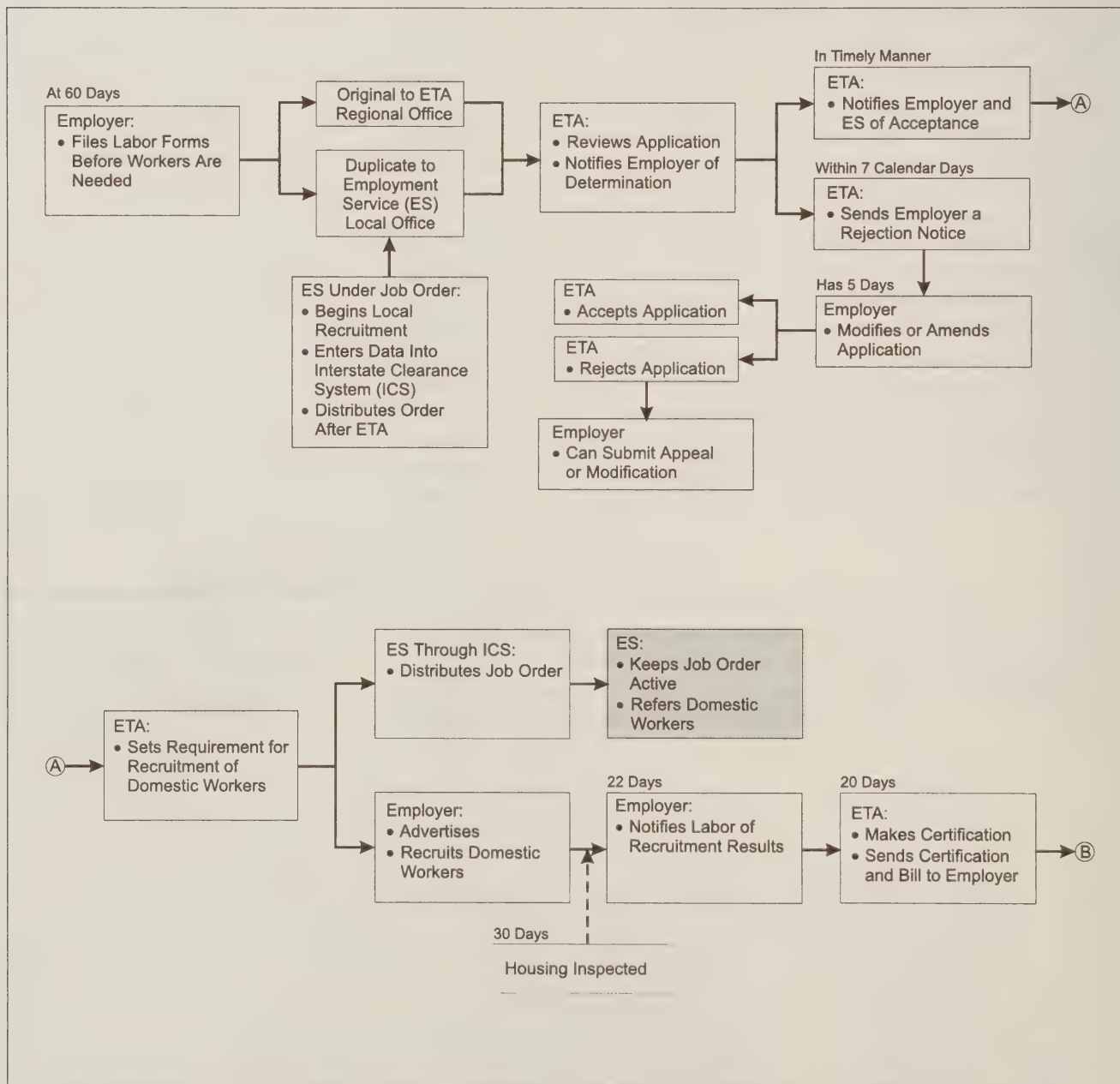
Statutory and Regulatory Deadlines for H-2A Process

To help ensure a balance between meeting the needs of agricultural employers for an adequate supply of seasonal labor and protecting the jobs, wages, and working conditions of domestic farmworkers, the H-2A application process requires the employer to submit applications to multiple agencies, as shown in figure 3.1.

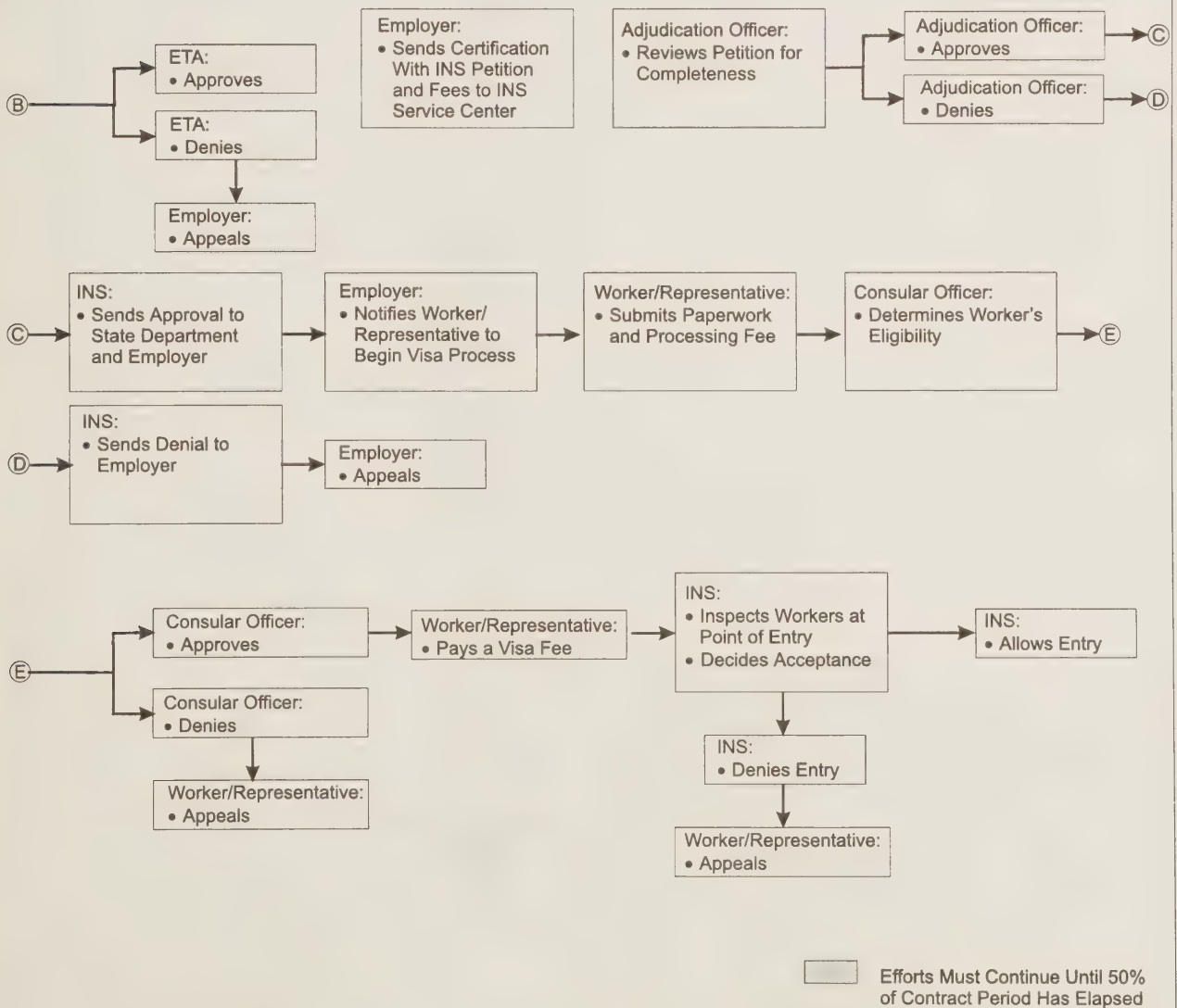
Chapter 3
H-2A Program Can Be Improved to Better
Meet the Needs of Agricultural Employers
and Workers

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and Workers

Figure 3.1: H-2A Process for Obtaining Permission to Bring in Foreign Workers

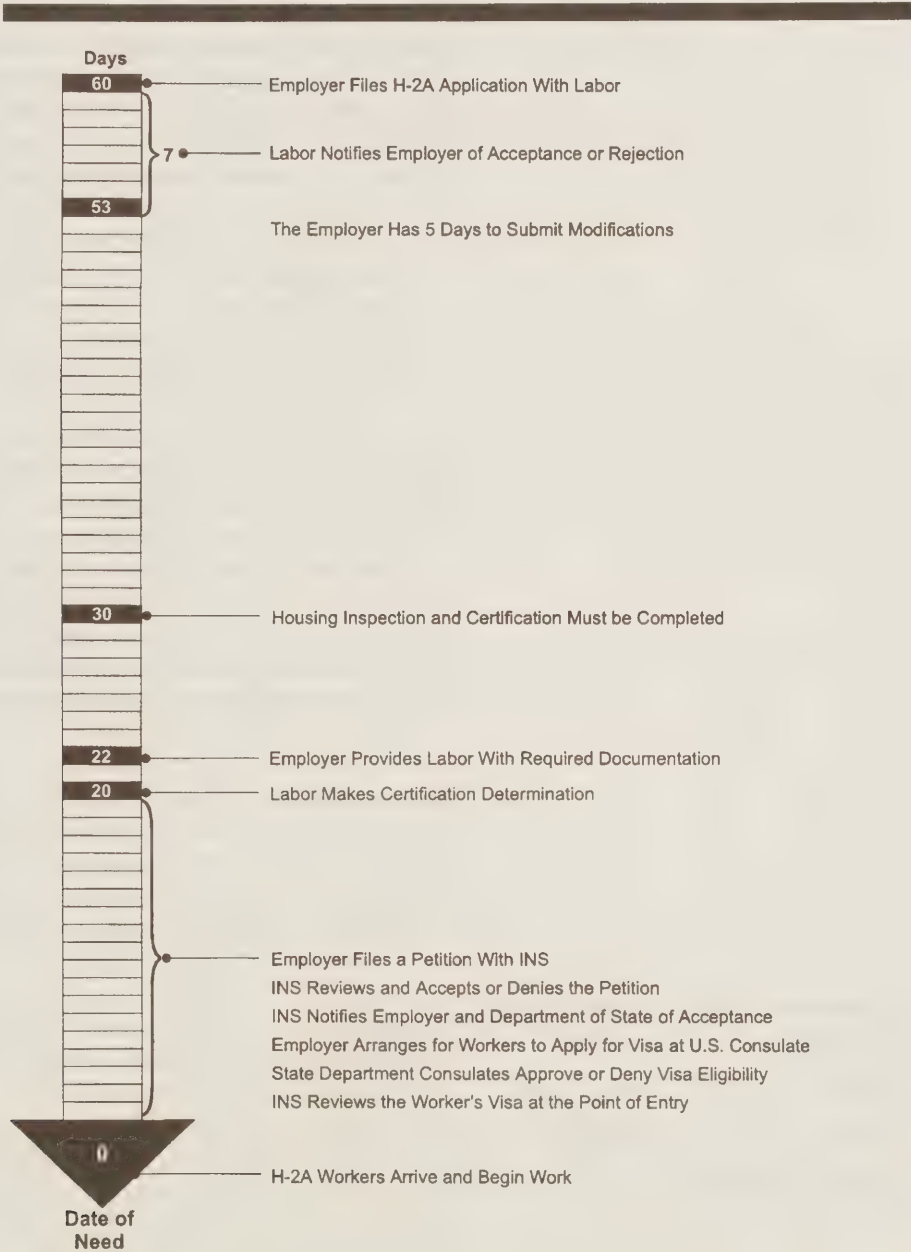


Chapter 3
H-2A Program Can Be Improved to Better
Meet the Needs of Agricultural Employers
and Workers



The H-2A application process also sets very specific time requirements that the employer, Labor, and state agencies must meet, as shown in figure 3.2.

Figure 3.2: Time Requirements for
Applying for Agricultural Workers
Under the H-2A Program



To allow sufficient time to attempt to recruit domestic workers and have housing for workers inspected, an employer wishing to participate in the H-2A program must first submit an application to one of Labor's Employment and Training Administration's (ETA) 10 regional offices, with a copy to the local state employment service agency (SESA), at least 60 days before the workers are needed. The application includes a request for alien employment certification and a job offer to domestic workers, which the SESA will use in a job order to try to locate domestic workers for the job. Labor may waive the 60-day filing requirement in emergency situations if the employer can demonstrate that "good and substantial cause exists," such as unforeseen changes in market conditions or unexpected unavailability of previously identified domestic workers.

To allow the employer an opportunity to amend the application and initiate mandatory "positive recruitment" of domestic farmworkers, ETA is required by law to determine whether the application will be accepted and notify the employer if it is to be rejected within 7 days of receipt. If the application is rejected, the employer has 5 days to submit amendments. Labor must include in the letter of acceptance specific steps the employer must take to actively recruit domestic workers for the job openings before the certification is issued. To provide sufficient time for the employer to petition INS and the workers to obtain visas, ETA's regional administrator must grant or deny certification, in whole or in part, no later than 20 calendar days before the date of need, provided that the employer has given Labor the documentary evidence that it met the certification criteria. (See fig. 3.2.) For example, to obtain workers on time, at least 22 days before the date of need, employers must provide ETA with evidence that they have attempted to recruit domestic workers and that prospective workers are insured for work-related injury or illness.

Employers Receive Labor Certification for Most of the Workers They Request

Employers are certified for most of the H-2A workers they request, regardless of the skill level required.³² Specifically, ETA issued certifications for 99 percent of the 3,689 applications filed nationwide in fiscal year 1996 and the first 9 months of fiscal year 1997. Although 3 percent of all applications were initially rejected, most of these were accepted after employers amended their applications. In addition, ETA certified all but 11 percent of the 41,549 job openings requested on these applications during this period. These applications simply request a

³²The skill levels of H-2A workers vary with their occupation. Most H-2A workers are field workers employed in the harvesting of crops, which has limited skill requirements. However, some H-2A workers are engaged in higher-skilled occupations such as sheepherding and operating combines. The vast majority of applications for these occupations were also approved.

certain number of job openings but do not identify individual job applicants. (See table IV.2 for detailed information about geographic distribution and results of applications filed in fiscal years 1994 through 1997.) The number of job openings Labor certifies is higher than the number of H-2A workers who enter the country, for various reasons including that employers may not fill all of the job openings certified or H-2A workers may be transferred from one employer to another. For example, although 17,557 job openings were certified for fiscal year 1996, about 15,235 H-2A workers were actually employed.

In fiscal year 1996, 68 percent of all H-2A workers came from Mexico, while 28 percent of all H-2A workers came from Jamaica. As shown in figure 3.3, this represents a significant shift over the last 10 years because the sugarcane industry, which was the predominant employer of H-2A workers until the early 1990s, has mechanized and therefore no longer needs the low-wage workers it brought in primarily from Jamaica. (See app. IV for more detailed information about the country of origin and other characteristics of H-2A workers.)

Figure 3.3: Country of Origin for H-2A Workers Has Shifted From Jamaica to Mexico, 1987-96



Completing Certification and Visa Processing by Date of Need May Not Provide Workers When Needed by Employers

The date of need employers request on the H-2A application may differ from the actual date the workers are needed. Agricultural employers, their advocates, and agency officials told us that it was extremely difficult to accurately estimate the date workers would be needed 60 days in advance of the harvest. Employers said that agricultural work is too dependent on the vagaries of weather to predict 60 days in advance when workers will be needed. This problem is particularly acute for crops that have a very short harvest time, such as cherries, for which the entire harvest season is as brief as 3 to 5 days.

Labor Often Issues Certifications After the Date of Need

Although Labor does not generally track application process timeliness, our analysis showed that a large number of Labor's certifications are issued too late to ensure that employers will be able to get workers by the specified date of need. In fiscal year 1996, one-third of all Labor's certifications (591 certifications) were issued after the statutory deadline of 20 days before the date of need.³³ For 43 of these applications, the certification was not issued until after the specified date of need. One cause of late certifications is employers' failure to file applications at least 60 days before the date of need, as required. For example, in fiscal year 1996, employers filed 1,817 applications with Labor. Of the 1,771 cases for which sufficient data were available, 737, or 42 percent, were filed fewer than 60 days before the date of need.³⁴

But even when the employer files an application on time, Labor still often misses the certification deadline. In fact, Labor missed the certification deadline for 41 percent of the 1,034 applications submitted at least 60 days before the date of need by agricultural employers. Reasons for missing the certification deadline included that (1) Labor failed to accept or reject the application in a timely manner, delaying the beginning of positive recruitment, and (2) the employer failed to provide required documentation in a timely manner.

³³For 46 applications, we were unable to determine the timeliness of submission because information was missing about either the date of need or the certification date.

³⁴In two cases, there was no information as to when Labor received the application.

Labor Lacks Management Data Necessary to Determine and Correct Problems in Complying With Statutory and Regulatory Time Requirements

Labor does not collect or analyze information that would allow it to determine either the extent or causes of its failure to meet regulatory and statutory deadlines. Labor's guidelines recommend that regional offices keep a log of H-2A labor certification activity, including the dates (1) workers are needed, (2) applications are accepted or rejected, and (3) certification is expected and actually takes place. However, Labor cannot provide information on the extent to which either Labor or the employers meet these time frames because not all regions collect and maintain this information. In some regions we contacted, Labor staff responsible for overseeing the H-2A program explained that their failure to keep such records was caused by a breakdown of computer equipment over 18 months earlier that had not been remedied. An official in one region told us that although the region enters some information into an automated system, the region does not have access to any reports from the system and would have to go through filing cabinets in order to obtain basic information on the processing of individual H-2A applications. In addition, the Chief of Labor's Office of Foreign Agricultural Labor Certifications told us that his office does not keep national records on the timeliness of Labor's responses to applications, and that if Labor misses a deadline, his office will hear about it from the employer. He agreed, however, that an automated system identifying impending and overdue certification dates is badly needed.

Failure to Provide Timely Notification of Acceptance Decision Could Cause Delays in Certification

Our analysis of data from ETA's Atlanta regional office, one of the offices we visited, showed that Labor frequently missed deadlines for notification. In fiscal year 1996, Labor initially accepted 95 percent of the applications it received, although it responded after 7 days for 44 percent of them by an average of almost 6 days, and by as long as 36 days. For the period October 1, 1996, through June 30, 1997, the Atlanta regional office notified the employer after more than 7 days for 46 percent of the 454 applications filed.³⁵

The timeliness of Labor's notification of its acceptance decision is important because employers and SESAs cannot begin full efforts to recruit domestic workers for H-2A job openings without it. For example, the SESA may not circulate the job order outside of the local area before the regional administrator accepts the application. In addition, Labor's acceptance notification specifies the recruitment effort that the employer must undertake, called "positive recruitment," within specific time frames

³⁵These data do not include seven cases for which acceptance and rejection dates were missing. Our analysis of data from all ETA regions indicates that timeliness is a problem in most regions.

in order for Labor to approve the certification. Once the application is certified, active recruitment efforts must continue until foreign H-2A workers have left for the employer's worksite.

Labor officials in numerous regions attributed the delays almost exclusively to employers' failure to provide in a timely manner the required documentation of positive recruitment and health care coverage. Some officials attributed the lack of timeliness as at least partially the result of the time required to inspect housing. However, no region had any systematic record to track the timeliness of employer documentation, so we were unable to verify this information.

Labor Lacks Information on the Frequency, Cause, and Timeliness of Emergency Applications

Labor has no required deadline for processing emergency applications; instead, ETA encourages regions to complete emergency applications as soon as possible, or within 1 week of receipt. We could determine neither the frequency of emergency applications filed nor the extent to which the 1-week goal was achieved because Labor does not identify and track such applications. We reviewed individual emergency applications in the three regions with the largest number of H-2A job openings in 1996. All three regions had waived the 60-day filing requirement for emergency applications filed in this region in fiscal year 1996. Emergency applications were accepted for several reasons, such as in response to an INS enforcement action that resulted in the removal of undocumented workers from a farm in the Northeast just before the harvest.

INS Petition Approval Process Can Increase Program Processing Time

After receiving Labor's certification, the employer and foreign guestworkers have 20 days in which to obtain visas before the date of need; the first step is for INS to approve the employer's petition to bring in nonimmigrant foreign workers for the certified job openings. Employers file the petition (form I-129) with one of four INS service centers: Dallas, Texas; St. Albans, Vermont; Lincoln, Nebraska; or Laguna Niguel, California. The petition includes Labor's certification and identifies desired "beneficiaries," or employees' names, if known.

INS officials in all four processing centers told us that petitions for H-2A nonimmigrant agricultural workers are unique in that they are not required to identify specific workers, and they rarely do. Most H-2A petitions identify only the number of workers needed for a specific job. INS, therefore, does not need to review individuals' visa eligibility as it does for other petitions. INS officials in both headquarters and the field offices

described the INS role in processing H-2A visa petitions as “rubber stamping” and suggested that it provided little or no added value while delaying employers’ ability to get workers in a timely manner, and adding to the costs.³⁶

INS is not subject to statutory processing deadlines, nor does it track processing times for the H-2A program paperwork. INS service center officials told us that because H-2A petitions represent only a fraction of the visa petitions the centers process (petitions for 15,000 workers out of petitions for 26 million visas for fiscal year 1996) and are not filed separately, a retrospective analysis of processing times would be prohibitively time and resource consuming. INS officials’ estimates of the time required to process the petitions across the INS service centers ranged from 2 to 21 days.

Officials at all four service centers told us that they expedite H-2A petitions. The adjudications officer examines the petition to ensure that Labor’s certification is enclosed; individual workers, if identified, have not been banned from entering the United States; and a check from the employer to cover the filing fee of \$75 per petition plus \$10 for every named beneficiary is enclosed. Adjudication officials told us that although they do not have data on H-2A denials, they rarely, if ever, deny H-2A petitions that include both the Labor certification and the appropriate fees. However, federal and state labor officials told us that INS’s fee structure sometimes causes confusion and delay in obtaining workers. For example, in one case we were able to track, the confusion caused a 10-day delay at INS, which meant workers were not available when they were needed. An emergency application, which requested visa extensions for H-2A workers already in the United States, was filed 7 days before the date of need. Labor inspected the housing and approved the certification in 1 day. Although INS completed review of the application in fewer than 2 days after receipt, it took 10 days to approve the petition because the employer did not submit the correct fee. Labor officials told us that they had been unable to contact the INS service center by telephone to determine the correct fee; as a result, they unintentionally misinformed the employer about the amount of the fee. The petitioner herself told us that she had contacted both Labor and INS to determine the correct fee but was given two different amounts. She sent two checks to INS to cover both possibilities, and INS approved the order 6 days after the date of need.

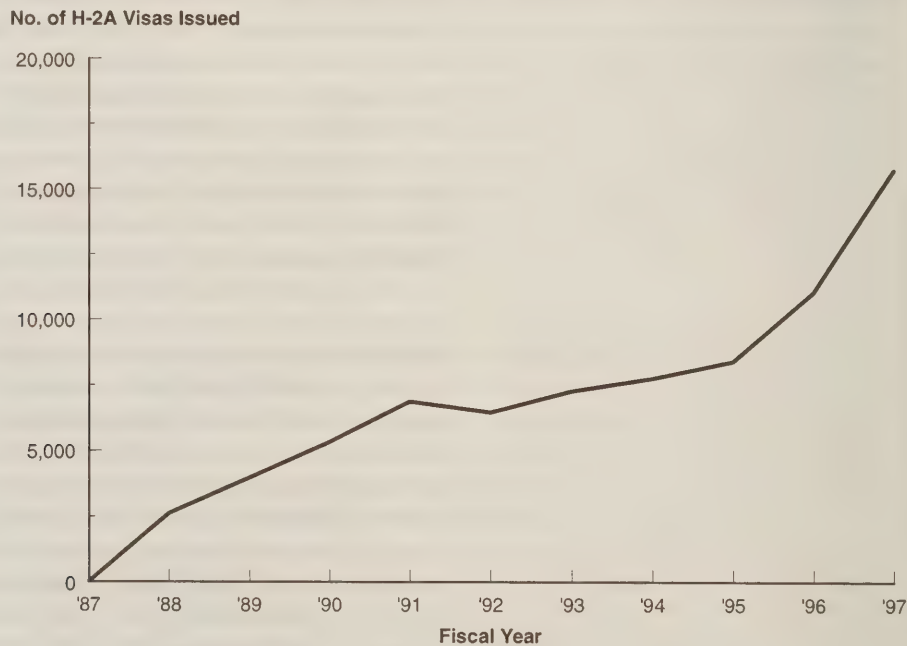
³⁶INS officials told us that they have considered proposals to delegate the agency’s role in the approval of H-2A petitions.

State Department Has Processed Substantially More H-2A Visas in Recent Years

After its approval, INS must notify both the employer and the State Department that the petition has been approved. The employer must now identify potential workers who in turn must file visa applications with accompanying fees directly to the State Department consulate in their country of origin. The worker must go to the consulate to apply for the visa. Because H-2A visa applicants come predominantly from Mexico, the consulates in Monterrey and Hermosillo, Mexico, together processed 93 percent of all H-2A visa applications in fiscal year 1996.

Although the number of workers entering the United States through the H-2A program has experienced limited fluctuation since the program's inception in 1986, the number of workers arriving with visas has increased substantially. (See fig. 3.4.)

Figure 3.4: Number of H-2A Visas
Processed, Fiscal Years 1987-97



This increase is caused by a shift in the country of origin of H-2A workers over the last 10 years. Nationals of certain Caribbean islands entering the United States as H-2A workers are not required to have visas. These H-2A

workers are represented by the West Indies Central Labour Organisation (WICLO), which organizes their entry into, stay in, and exit from the United States. To apply for H-2A Caribbean workers, an employer goes through the same process with Labor and INS that he or she would for workers from other countries. However, for Caribbean workers, INS keeps the form I-129 petition, rather than sending it to the consulate where a visa would be issued. Instead, these workers enter the United States through Miami with a valid travel document provided by their home governments and are not required to have a passport or H-2A visa. This travel identification document is approved by INS (in addition to the already approved I-129 petition). INS gives the workers a form I-94, Record of Arrival/Departure, stamped "H-2A." Once the workers enter the country, they typically travel to various employers along the east coast, with transportation arranged by an employer or employer group. When the workers leave, they return their I-94 and WICLO oversees their departure.

Most H-2A Visa Applications Are Filed in Groups

Officials at both consulates reported that they require appointments for applications for groups of H-2A workers. Most of the petitions are initiated by a single employer or "handler" on behalf of multiple applicants; very few petitions are filed for individual applicants. The employer or handler (a representative of the employer who recruits and/or organizes the workers) generally selects which consulate to use and schedules the appointment. According to H-2A workers and advocates, handlers may charge a fee to each individual worker within the group. The consulates are not obliged to notify the petitioner that the approved petition has arrived, but they sometimes do so. The employer or handler usually keeps in touch with the consulates to find out, among other things, when the INS visa approval arrives. Consulate officers also reported that H-2A handlers and employers are usually repeat applicants, familiar with the process and consular staff.

All H-2A applicants must submit a valid passport and Nonimmigrant Visa Application (form OF-156), and pay a \$20 processing fee. At Monterrey, this fee is paid before the visit through a local bank designated by the State Department. Monterrey consulate officials told us that the applicant must have a receipt from the bank in order to be admitted into the consulate.

Once the paperwork and processing fee are submitted, the consular officer begins the process of adjudication, leading to either approval or denial of the petition. First the consulate official checks to make sure that there is a valid labor certification and INS petition approval. Consulate officials told

us that the officer is also responsible for ensuring that the applicant has a residence abroad and intends to return home. To do this, the officer may interview the applicant and review the paperwork and record of previous trips, if any, and determine the nature of ties with family and friends in the homeland. At Hermosillo, consular staff interview applicants individually, in a group, or on a spot-check basis. Because Monterrey gets so many H-2A applicants, such interviews take place only if a problem arises. The officer is required to run the name of each applicant through the Consular Lookout and Support System (CLASS), a database of individuals known or believed to be ineligible for visas to enter the United States, to ensure that the applicant is not barred from entering the country.

Although applicants can be rejected if, for example, they cannot document their residence, this happens infrequently. The Hermosillo consulate issued 709 H-2A visas in fiscal year 1996 and rejected an estimated 5 petitions, or less than 1 percent. Monterrey issued 9,568 H-2A visas that year and rejected 38 petitions, also less than 1 percent.

If the applicant clears the CLASS review and all paperwork is in order, State approves the petition and the applicant pays a visa fee, which differs by visa category. The consulates do not track the processing times for approving petitions and issuing visas, but both consulates reported that visas are usually issued the same day the applicant visits the consulate to apply for it. It may take days or weeks, however, from the time the consulate receives the I-129 petition until the visa is issued, if an applicant delays scheduling an appointment or visiting the consulate. Officials at the consulates stated that current resources allow them to process all the H-2A visas they receive, although the Monterrey consulate had to turn away an estimated 40,000 tourist visa applicants in fiscal year 1996 because of resource constraints. If one consulate did set a limit on the number of visas it could process in a day, however, the applicant could choose to apply for a visa at the other consulate.

INS Makes Final Determination at Border

Even when H-2A workers have been issued visas, they are not guaranteed entry into the United States but are subject to inspection at the port of entry by immigration officials, who can deny admission. At the port of entry, an INS official issues the form I-94, which notes the length of stay permitted. The worker is admitted to the United States for the “validity period” of the petition—that is, until the labor certification expires. H-2A visa holders can be admitted to the United States 7 days before the beginning of the validity period and stay 10 days after it ends.

Data on the Number of Farmworkers Who Overstay Their Visas Are Not Available

Officials at INS, which has the responsibility of monitoring whether visitors overstay their visas, told us that no reliable data exist on the number of H-2A workers who overstay their visas. As we reported in 1995, the task of estimating overstays presents a difficult challenge.³⁷ INS procedures require that visitors return the I-94 when they leave the country. It has a data system for tracking the dates when individual foreign visitors arrive in and depart from the United States. However, the agency cannot assume that all people whom the system does not record as having left have, in fact, overstayed their lawful periods of entry because, according to INS officials, about 70 percent of forms I-94 are not returned. This is especially true of nonimmigrants who leave the United States by surface transportation such as automobile or bus, which would include most H-2A workers. Because no INS employees are inspecting traffic exiting the country at land border crossings, there is no assurance that the forms I-94 are being submitted.³⁸

Involvement of Multiple Levels of Government and Agencies May Result in Redundant Oversight Activities and Participant Confusion

Because the H-2A program involves multiple agencies at various levels of government, oversight activities sometimes overlap, resulting in duplication and confusion among both the agencies and the employers. Employers, advocates, and agency officials repeatedly expressed frustration about the lack of information on various segments of the H-2A process which they needed to obtain, or assist others in obtaining, foreign guestworkers. As mandated by IRCA, Labor produced a handbook on the H-2A Labor certification process in 1988. The 325-page handbook provides detailed information on application requirements, including relevant sections of the Federal Register and Code of Federal Regulations. However, some of the information provided relates to provisions that are no longer applicable, the handbook is not user-friendly, and Labor officials agreed that it includes little information about the process after certification by Labor.

Multiple Agencies Can Create Confusion Among Agricultural Employers

Employers we interviewed were frequently confused by the multiple agencies and levels of government involved in the H-2A program. Discerning how to comply with regulations can be difficult because of overlapping responsibilities for inspection and the resulting conflicting administrative procedures and regulations. Complying with housing requirements is a case in point. Federal regulations require that employers

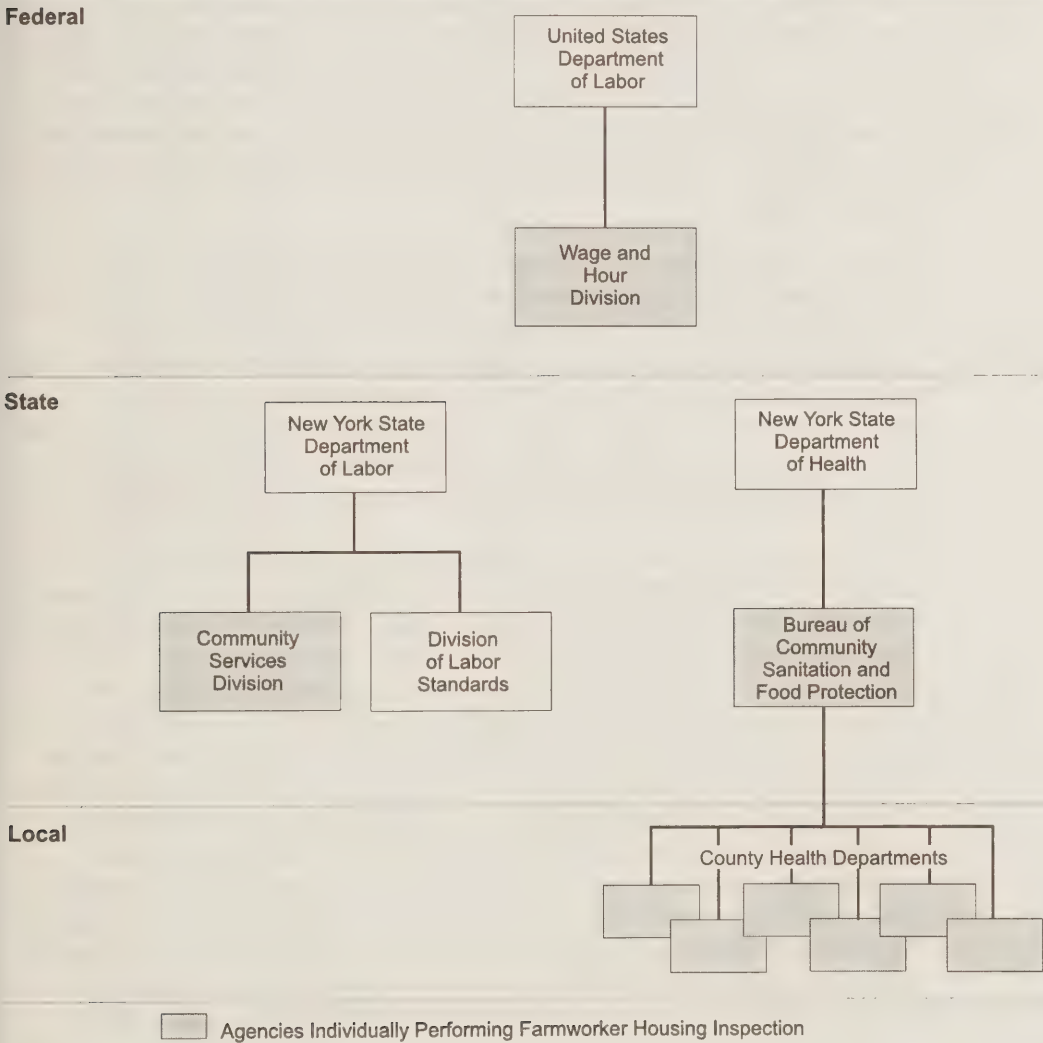
³⁷See Illegal Immigration: INS Overstay Estimation Methods Need Improvement (GAO/PEMD-95-20, Sept. 26, 1995).

³⁸The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 requires INS to take measures to address this problem.

in the H-2A program provide worker housing and that such housing meets health and safety standards before and during occupancy. The housing must be inspected and approved 30 days before the employer's date of need. In some of the states we reviewed, H-2A housing was also subject to state and local housing regulations and inspected by multiple agencies.

Having numerous standards and procedures can be inefficient and create confusion about compliance requirements. For example, although New York, a state with heavy H-2A participation, took action to streamline its housing inspection process, it continues to require multiple inspections. To formalize a working relationship, federal and state agencies responsible for enforcing "employee protection legislation to guard against the exploitation of farmworkers" developed a memorandum of understanding, including an agreement to exchange information on housing inspections, and coordinate inspections and notification of violations. (See fig. 3.5.)

Figure 3.5: Multiple Agencies Enforce Farmworker Protections in New York



Officials in the New York State Department of Labor’s Community Services Division told us that housing inspections can be conducted as many as three times: once by the federal Department of Labor, once by Community Services Division of New York’s Department of Labor, and

once by the New York State Health Department. The Director of the Bureau of Community Sanitation and Food Protection, which is responsible for enforcing the State Sanitary Code relating to migrant worker housing, told us that his department is still uncertain as to the role of the agencies that signed the memorandum of understanding. He said that the federal Department of Labor carries out some inspections, but “picks and chooses” and does not keep track of the sites, so the state Health Department does not know which sites have been inspected. As a result, the Health Department ends up inspecting all housing facilities in the state every year.

Virginia, another state with heavy H-2A participation, has a similar problem with its housing inspection operations. While the Virginia Health Department and the Virginia Employment Commission developed a memorandum of understanding in 1986 to avoid duplication of effort, H-2A housing in the state continues to be inspected twice, once by the Employment Commission and once by the Health Department, in contrast to non-H-2A housing that is inspected only by the Health Department. A state official complained about the redundancy in H-2A inspections.

Other states have tried to address this problem of redundancy. For example, North Carolina has developed a system to remedy its problems with multiple agency oversight that has elicited praise from the various stakeholders. To avoid duplication and reduce confusion, in 1993, the state employment commission, the state health department, and the federal ETA signed a memorandum of agreement that the state health department would conduct all housing inspections using county health departments’ water and septic system certifications. If the state health department gets backlogged and cannot inspect the housing before the workers arrive, employers not using H-2A workers can notify the state employment commission, which will allow the employers to house workers until the housing is inspected. Federal regulation requires employers using H-2A workers to have housing certified prior to occupancy. Health department officials told us that they prioritize inspections for H-2A employers because H-2A requires the inspection 30 days before the date of need.

Confusing and redundant housing inspections may result in misinterpretations or misunderstandings of the regulations by program participants. Employers, particularly those in California, told us that the difficulty of providing and maintaining housing that complies with regulations would prevent them from participating in the H-2A program in the event of a labor shortage. However, some of the housing standards

employers described as preventing them from providing housing were not required for participation in H-2A. For example, in California, employers and advocates for employers and labor told us that using tents for farmworker housing was effectively prohibited because employers are required to provide heating and air-conditioning, which are difficult to provide in a tent. However, California state housing officials told us that tents have been certified in the past and are still acceptable, as long as they meet certain specifications, and that federal housing regulations also permit such arrangements. They also said that air-conditioning is not required because there are no maximum temperature requirements for temporary housing to be used for fewer than 180 days. Moreover, federal migrant farmworker housing regulations have no maximum temperature requirements, and both federal and state regulations establish minimum standards for heating only if the outside temperature falls below 60 degrees. Furthermore, in California, local housing standards, including those for heating and cooling, are preempted by state standards.

Using Temporary Structures May Address Community Opposition to Permanent Farm Labor Housing

Correcting misunderstandings about H-2A program housing requirements may also address agricultural employers' concerns about community opposition and local zoning laws that some have encountered when they attempted to build more permanent farmworker housing. Federal and state labor officials agreed that employers have reason to be concerned about "not in my backyard" community opposition to farmworker housing and restrictive zoning laws because they limit the availability of low-income housing generally and make it difficult for farm employers to build housing. A representative of a California company that grows apples and cherries told us that the company had tried to build housing at an estimated cost of \$1.5 million for 240 temporary farmworkers in a sparsely populated community. The planned housing project would have been used about 10 months a year and would have included recreation rooms, security guards, and parking. Community residents strenuously objected, fearing the project would bring crime and other problems into the area. The company official told us that they ended up abandoning efforts to construct permanent farmworker housing and withdrawing the company's H-2A petition.

Officials in New York described a similar problem on the eastern end of Long Island, where residential development has overtaken farm land and where community opposition has grown to employers' attempts to build housing for farmworkers. It is difficult, said one state housing official, for agricultural employers to build housing "unless the grower has a lot of

land and the neighbors cooperate.” Another official in New York observed that zoning boards have not approved any new housing: Some growers who wanted to put substantial investments into new farmworker housing (\$100,000, in one case) were barred from doing so by the local zoning board.

Worker Protection Provisions Under H-2A Program Hard to Enforce

It is difficult to determine the effectiveness of worker protections in the H-2A program. H-2A guestworkers may be less aware of U.S. laws and protections than domestic workers and are less likely to file a complaint. In addition, Labor’s Wage and Hour Division (WHD) faces inherent obstacles in enforcing existing protections when the worker is legally in the country only at the behest of the employer and must leave the country soon after separating from employment. Our analysis of state and federal enforcement data and data from a major H-2A employer do, however, raise concerns about the effectiveness of several of the H-2A program’s worker protection provisions, in particular, positive recruitment and wage guarantees, including guaranteed wages for three-quarters of the contract and the first week of the contract.

Positive Recruitment Requirement Providing Few Jobs for Domestic Workers

H-2A provisions require that before Labor will certify a labor shortage, an employer must actively try to recruit (“positive recruitment”) domestic workers for H-2A job openings, including using newspaper and radio advertising in geographic areas where such workers may reside. The purpose of this requirement is to protect the employment opportunities of domestic workers by giving them first choice of accepting this work to bring in. Filling job vacancies with domestic workers would reduce the number of H-2A workers to bring in.

The positive recruitment requirement appears to result in few domestic workers being placed in these jobs. An employer is required to hire all qualified workers referred by state job services. However, we found that state job services may refer only a few workers for H-2A job openings, even when they make many referrals and placements in agriculture as a whole. The North Carolina Employment Security Commission record of referrals of agricultural workers for 1996 shows 27,461 potential workers referred and 15,886 workers placed with non-H-2A employers. In contrast, even though North Carolina employers asked for more than 5,000 workers, about one-fourth of all H-2A workers requested nationwide, the Commission referred only 13 potential workers to H-2A employers. Our analysis of ETA data shows the same limited SESA referrals in most other

states. SESA officials in other states told us that they rarely refer agricultural workers for H-2A job orders because of concerns about H-2A employers' willingness to hire the workers. H-2A employers we spoke with told us that they offer domestic workers jobs but that the workers either do not report for work or they quit before the harvest ends. While several H-2A employers told us that positive recruitment was a waste of time and money because no domestic workers were willing to accept the work, non-H-2A employers joined others in asking why one agricultural employer would be unable to find a single domestic worker, while a neighboring employer could find all he or she needed.

Federal and state Labor officials expressed concern that the increasing role of agricultural employer associations in accessing the H-2A program for individual employers may pose problems for positive recruitment. The number of workers requested by associations has grown from 4,800 in 1994 to 12,300 in 1997, over 55 percent of the 21,701 workers requested, and the number of associations that filed applications has grown from 7 to 9. In filing an H-2A application, an association may file in one of three ways: as an agent, a sole employer, or a joint employer. In a joint employer relationship, ETA grants the certification to both the association and its specified employer members, and the association assumes the liabilities and obligations of an employer. Associations make it easier for smaller employers to access the H-2A program in that they normally prepare and file the appropriate Labor and INS forms covering individual employers, advertise for domestic workers, and, in some cases, recruit the foreign H-2A workers. Such a relationship also increases flexibility in that associations are allowed to transfer workers among individual growers as the workload dictates. However, officials in both federal and state agencies told us that when associations represent employers from a large geographic area (for example, an entire state), domestic workers may be less likely to accept job offers for H-2A openings and, if hired, exhibit high turnover.

Several explanations have been suggested for the failure of those who are referred to the association to accept or stay at work. One possible reason is that the job description may not accurately reflect the actual work involved, and the worker is unable or unwilling to perform the work required. Another reason may be that, unlike most individual agricultural employers, a joint employer association may offer jobs at a worksite far from the worker's home, and the worker may be unable to accept the job because of the need for transportation and housing. Although current law requires that employers provide transportation and housing for workers

recruited through the Interstate Clearance System, the law does not require that these be provided for locally recruited workers unless they are not reasonably able to return to their residence within the same day. Labor generally considers a reasonable commute to be as much as 60 miles, which may be difficult for those domestic farmworkers who do not own cars. Employers using workers recruited by associations can cover a large geographic area, such as an entire state. Labor's Office of Inspector General has undertaken a review of H-2A positive recruitment provisions and expects to issue a report in the spring of 1998.

Although explanations for the lack of success of positive recruitment with associations are largely anecdotal rather than empirical, our analysis did confirm that a significant number of domestic workers refused work. Of the 220 domestic workers who applied to one major H-2A employer in 1996, almost 70 percent refused employment or did not show up for work. This employer was an association that filed "master job orders" with ETA, allowing it to place workers all over a large state. SESA officials in one state told us that they had recently obtained commitments from associations to place domestically recruited workers at worksites close to their homes. However, it is unclear how such commitments will be monitored and enforced.

Multiple Factors Make the Three-Quarter Guarantee Hard to Enforce

Under the H-2A program's three-quarter wage guarantee, an employer must offer each worker employment for at least three-fourths of the workdays in the work contract period, including any extensions. If the employer provides less employment, the employer must pay the amount the worker would have earned had the worker been employed the guaranteed number of days. This provision is intended to ensure that domestic and foreign farmworkers who are recruited and often travel from distant locations to work in the United States do not actually end up earning substantially less than they were led to believe they would earn through the initial job offer, and to encourage H-2A employers to accurately estimate both their labor force needs and the duration of employment they can offer so as to limit their potential wage liabilities. Hence, employers will make honest assessments of both the number of workers needed and the amount of time that they will be employed, and prospective workers will have some guarantee about the total wages and duration of employment to expect.

It is difficult to determine the extent to which the three-quarter guarantee is being complied with or violated. Agency officials and worker advocates

report that H-2A workers are unlikely to complain about worker protection violations, including the three-quarter guarantee, because they fear that they will lose their jobs or will not be accepted by the employer or association for future employment. H-2A workers we spoke with raised this concern. For example, in 1997, ranchers employing sheepherders failed to pay them the proper wages under the three-quarter guarantee, but no complaint had been filed with WHD. WHD only became aware of the situation when one of the sheepherders was assaulted and a local newspaper publicized the attack. The employers admitted that they failed to pay the appropriate wages to their sheepherder employees. In another example, Employment Standards Administration (ESA) officials told us they were aware that some employers may have brought in Jamaican H-2A workers without paying them wages in compliance with the three-quarter guarantee, but said they were too understaffed to investigate the matter. According to an ESA official, in fiscal year 1996, the agency received no complaints from workers employed by H-2A employers. ESA data from that year showed that most investigations—93 percent—were targeted by ESA or triggered by complaints from SESAS; only 7 percent were triggered by complaints from third parties, such as Legal Services.

The three-quarter guarantee is particularly difficult to enforce because the provision is only applicable at the end of the contract period. Because H-2A workers must leave the country within 10 days of the end of the contract, there is only a small window of opportunity to interview the workers in the United States. Regional and district WHD officials said they could not monitor the application of the three-quarter guarantee effectively because they cannot interview workers after they return to Mexico to confirm their work hours and earnings. Similarly, it is hard to prove retaliation against workers who complain about such violations because there is no way to obtain and corroborate information.

These enforcement difficulties also create an incentive for less scrupulous employers to request contract periods longer than necessary: if workers leave the worksite before the contract period ends, the employer is not obligated to pay the three-quarter guarantee or their transportation home. If this occurs, however, it is almost impossible to determine if these workers have left the country or are taking jobs from domestic workers. Data from a major employer showed that almost 40 percent of their H-2A workers (1,763 workers) left prior to the end of the contract, losing their right to both the three-quarters guarantee and transportation home. This development raises concerns about whether the employer accurately estimated the ending date of need. Discussions with H-2A program

officials suggest that, at least with associations, contract periods have been lengthening in duration in recent years. More importantly, the three-quarter guarantee does not provide incentives for the employer to ensure that the workers stay through the end of the contract period.

H-2A Workers Do Not Receive Same Guarantee for Wages Provided to Domestic Workers

Migrant and seasonal farmworker regulations provide a guarantee of first-week wages for domestic workers recruited through the Interstate Clearance System. If an employer fails to provide adequate notification in amending an incorrect date of need, the employer must pay workers referred by the job service in the first week when they are present and available for work and no work is provided. The H-2A program's equivalent treatment provision, sometimes referred to as "disparate" treatment, requires that the employer provide the same minimum wages, benefits, and working conditions to H-2A workers that are provided to domestic workers employed in "corresponding employment." However, officials at the state and federal levels do not apply this provision to foreign workers, even though they joined worker advocates in expressing concern about the community impact when foreign workers arrived in their areas without work or money to support themselves. In one state, an association of churches reported having to raise money to house and feed foreign H-2A workers hired by local employers who had incorrectly estimated the date of need such that when the H-2A workers arrived at the worksite there was no work or wages for several weeks.

Questions About Location of Enforcement Responsibility Within Labor

ETA has the authority to sanction employers, by denying their certifications, if they have committed substantial violations of the terms or conditions of a temporary foreign agricultural labor certification. ETA must notify an employer that has committed a substantial violation that certification will not be granted for a certain period of time, depending on the number and kind of violations. However, ETA is not responsible for enforcing H-2A work contract provisions or other labor violations; WHD has this responsibility. WHD has authority and responsibility for conducting investigations and inspections regarding matters such as the payment of required wages, transportation, and housing; reporting violations to ETA; and invoking penalties, such as recovery of unpaid wages, assessment of civil monetary penalties, and seeking injunctive relief against the employer. ETA officials told us that they try to coordinate with WHD but that they have never denied certification for labor law violations, although they typically use the authority as leverage in obtaining voluntary compliance. However, because WHD is the agency that enforces the labor laws, it is the

agency that most needs this leverage. WHD field officials expressed concern about the difficulties of ensuring that abusive employers do not participate in the H-2A program, where they believe the potential for abuse is much greater.

Sustained Increase in Demand for Guestworkers Would Require Additional Agency Resources

Although a national farm labor shortage currently appears unlikely, Labor, INS, State, and state employment service officials who implement the H-2A program said that they could handle unanticipated, moderate short-term program workload increases by shifting staff resources, or, as is the case at the State Department, prioritizing the types of visas to be processed. However, officials from the federal agencies all agreed that any massive (for example, a 10-fold increase to 150,000 per year), sustained national increase in the demand for agricultural guestworkers could not be effectively processed without additional resources. Labor and State officials also emphasized that the additional staff necessary to process large, sustained workload increases would have to be added over the course of a year, given the need to train and relocate personnel. In contrast, SESA officials stated that, in general, additional resources would not be required because the steps that they take to recruit workers are not significantly more resource intensive to meet the demands from a few employers as for many.

Discussions with officials at State, Labor, and USDA noted that the administration is aware of the potential problems facing agricultural employers and the processing agencies if the H-2A program was faced with a major, sustained workload increase. Officials from Labor, INS, USDA, and State have met in the administration's Domestic Policy Council to discuss the potential for significant increases in the demand for H-2A guestworkers to occur and to develop an appropriate response, if necessary. Officials at Labor and USDA told us that several proposed options have been discussed but that these options are not yet available for review.³⁹

³⁹We were unable to obtain employers' and labor advocates' perspectives on the feasibility of implementing plans that were not yet available for discussion.

Conclusions and Recommendations

Conclusions

Given the condition of the agricultural labor market and INS' current enforcement resources and priorities, the likelihood of significant labor shortages, and the resulting massive increases in the demand for H-2A guestworkers, appears small. Although a large percentage of farmworkers are not legally authorized to work in the United States, INS' current enforcement efforts are unlikely to cause a major disruption in U.S. agricultural production or generate a major increase in the demand for H-2A workers. The H-2A program currently provides guestworkers for the small percentage of agricultural employers who request them on either a regular or emergency basis. Labor and INS deny or disapprove applications from few agricultural employers, State denies visas to few prospective guestworkers, and INS detains few of these workers at the border. However, the potential for localized labor shortages for a specific crop or on a geographic basis remains.

Although it successfully provides workers to employers who request them, the H-2A program requires employers to interact with multiple agencies at different levels of government, a process that can seem very confusing and difficult to navigate. No centralized source of information exists that clearly explains the entire H-2A application and labor procurement process. Labor's handbook gives information about provisions that are no longer applicable, is not user-friendly, and includes little information about the processes at INS and State.

This perspective also extends to Labor's oversight of the program. Labor currently collects limited data to facilitate oversight of the program's day-to-day operations. Labor was generally unable to determine the extent to which its regional offices were in compliance with statutory and regulatory deadlines governing the H-2A program. Our review, however, found significant noncompliance with these mandated deadlines.

Our work suggests that some procedural changes could improve the program's ability to meet the needs of agricultural employers. Processing times under the current program are unnecessarily extended as a result of the requirement that INS approve all non-Caribbean Labor certifications before transmitting the request for workers to the State Department. Because H-2A visa petitions are unlike those in any other category in that they rarely identify individual workers, INS is in the position of merely "rubber stamping" the work of others, burdening the employer with unnecessary paperwork and fees and adding as much as 2 to 3 weeks to the entire H-2A application process. Delegating INS' role of authorizing approval of H-2A visa petitions to Labor could reduce the bureaucratic

maze of rules and paperwork that agricultural employers now face. This transfer would need to be accompanied by revisions in regulations, such as accommodating visa extensions where no new Labor certification is required and ensuring that appeals procedures are changed to ensure employers' right to due process.

Such a transfer could also significantly reduce total application processing time. Many agricultural employers have reported that the current requirement of filing an application at least 60 days before the date of need is difficult given the uncertainties inherent in agricultural production. A shorter period could eliminate some of this uncertainty. Delegating INS' approval role in the H-2A program could reduce total application processing times by 2 weeks. This would permit Labor to modify to 45 days the existing administrative requirement that applications be submitted at least 60 days before the date of need. However, to ensure that agricultural employers have sufficient time to positively recruit for domestic workers, obtain inspections of farmworker housing, and show proof of workers' compensation coverage, it will also be necessary for the Congress to modify to 7 days the statutory requirement that applications be approved 20 days before the date of need. Without modifying this requirement, employers will not have sufficient time to meet their duties as required by the program and domestic workers will not have ample opportunity to compete for agricultural employment.

Obtaining workers through the current H-2A program requires agricultural employers to interact with multiple agencies at different levels of government. Given the often time-critical needs of agricultural employers, the multiplicity of agencies can seem confusing and seem difficult to access. Current written information that Labor provides to prospective employers is incomplete, hard to understand, and in some instances, outdated. These weaknesses contribute to a general perception that the program is too complex to be accessed by employers who may require its services.

We also identified several weaknesses regarding the protections afforded to both domestic and foreign workers. In general, Labor's WHD is the primary agency for the enforcement of existing H-2A contracts and other labor standard provisions, while ETA administers the H-2A program, working with state job services and agricultural employers to facilitate the application process. However, under current law, ETA exercises Labor's authority to suspend an employer's participation in the H-2A program if this employer has committed a serious labor standard or contract violation

and WHD, when conducting an enforcement action, must request that ETA consider using this authority. Given the overall separation of program functions between WHD and ETA, the fact that suspension authority resides with ETA seems incongruent. We believe, and Labor officials agreed, that consolidating this suspension authority in WHD would permit ETA to concentrate more effectively on the H-2A program's crucial administrative duties and possibly increase the effectiveness of WHD enforcement.

We found another weakness in the equivalent treatment provision of the H-2A program, commonly referred to as the "disparate" treatment provision. This provision generally requires that the employer provide equal treatment to domestic and foreign workers in terms of opportunities, wages, benefits, and working conditions. For example, if an employer hires H-2A workers at a particular wage, that wage is the minimum that must be paid to any domestic workers performing the same work for that employer. However, we found that while current Labor regulations guarantee wages for the first week of work to domestic workers who are referred to agricultural employers through the Interstate Clearance System of Labor's Employment Service, even if they are unable to work during that period, comparable wage protection is not afforded to foreign workers. This disparity appears inconsistent with Labor's general application of the H-2A equivalent treatment provision and could cause needless personal hardship for some foreign workers.

Our review also raised concerns about other existing protections afforded to workers under the H-2A program. Current program provisions requiring that H-2A workers receive wages at least equal to three-quarters of the contract period were implemented to protect foreign workers from exploitation and provide some certainty to both workers and employers so that workers will know how much work to expect, and employers can limit their potential wage liabilities. On one hand, the few complaints registered about this provision suggest compliance. But some H-2A workers may be unaware of their rights or how to exercise them in the United States. Furthermore, our findings concerning the increasing length in the average contract period for H-2A workers and indications that a significant number of H-2A workers may be separating from employment before the end of the contract period, invalidating the guarantee, also suggests that this protection may not always work as intended and that some employers could "game" the system to avoid paying wages and transportation they owe to H-2A workers.

One solution to this vulnerability is to apply the three-quarter guarantee incrementally to shorter periods of time throughout the duration of the contract. For example, requiring that workers receive either three-quarters of the full-time wage rate or the wages for the actual hours worked, whichever is larger, payable at the end of every 2 or 3 weeks, could provide additional protection for H-2A workers. However, the length of the pay increment should consider that the contract period does not always correspond with the period of time the H-2A worker spends at one worksite. Some large associations move workers from one worksite to another during the same contract, and the workers receive wages from different employers. It is important that any modification of the three-quarter guarantee be implemented in a manner that protects workers but also avoids increasing the administrative complexity of the program.

Recommendations

To simplify the H-2A application process and reduce the cost and burden on agricultural employers, we recommend that the Attorney General

- delegate authority for approval of H-2A visa petitions from INS to the Secretary of Labor or designee and revise corresponding regulations as necessary to implement and facilitate such an agreement, including revising visa extension and appeals procedures.

If the Attorney General delegates this authority, we recommend that a combination of two other actions be taken.

After the Attorney General has delegated INS' role in petition approval to Labor, to reduce total application processing time and facilitate better accuracy in estimating the date workers will be needed, we recommend that the Secretary of Labor

- amend the regulations to allow H-2A applications to be submitted up to 45, rather than 60, days before the date of need so long as INS does not have a role in the petition approval process.

To protect work opportunities for domestic workers by ensuring that sufficient time is available for agricultural employers to positively recruit them while reducing the total processing time, we recommend that the Congress

- amend the Immigration and Nationality Act so that, as long as the authority for approval of H-2A visa petitions remains with Labor, Labor is

required to complete all applications at least 7 days before the date of need, rather than 20 days.

To better protect both domestic and H-2A workers, we recommend that the Secretary of Labor take the following actions:

- Extend the authority to suspend employers with serious labor standard or H-2A contract violations to WHD,
- Revise its regulations to require agricultural employers to guarantee H-2A workers' wages for the first week after the date of need and to pay workers those wages no later than 7 days after the date of need, and
- Revise regulations regarding the three-quarter guarantee to remove incentives to overestimate the contract period. Revisions Labor considers should include applying the guarantee incrementally during the duration of the H-2A contract in a manner that would improve the protection afforded to H-2A workers but also minimize any additional administrative burden on agricultural employers.

To improve service to both employers and workers, we also recommend that the Secretary of Labor

- regularly collect data on its performance in meeting H-2A regulatory and statutory deadlines for processing H-2A applications, and use these data to monitor and improve its performance; and
- update and revise the H-2A handbook to include the procedures for all agencies involved and key contact points, both at Labor and at other agencies.

Agency Comments and Our Evaluation

Labor, the State Department, and USDA all commented on a draft of this report. Labor and State, agencies responsible for implementing our recommendations, generally concurred with our findings and most of our recommendations. For example, Labor concurred with our recommendation that the Attorney General delegate authority for approval of H-2A visa petitions from INS to the Secretary of Labor. In contrast, USDA, which serves in an advisory capacity and has no responsibility for H-2A program administration, while agreeing with some of our findings and recommendations, submitted detailed comments on statements, conclusions, and recommendations presented in the draft report that it believed were either inaccurate or required clarification. (The full text of Labor's comments is in app. VIII, State's is in app. IX, and USDA's is in app. X.)

We requested comments from the Department of Justice as well. Justice's INS staff provided technical comments on the draft report, which we incorporated as appropriate. Justice did not, however, within the time available, provide official comments on the overall findings and conclusions of the report or on the recommendations.

Labor Stressed Existence of Agricultural Labor Surplus

Labor generally agreed with the report's findings, conclusions, and recommendations. Labor, did, however, suggest two revisions to our recommendations, which we made, and numerous technical changes, which we incorporated as appropriate.

While Labor specifically agreed with our finding that "a farm labor shortage does not now exist and is unlikely in the foreseeable future," it also contended that there is evidence of a farm labor surplus. The Department cited the many economic indicators we presented in our analysis, such as high unemployment rates in agricultural areas, the persistent heavy underemployment of farmworkers, and declining real farm wages, both in hourly and piece rates, as evidence of a labor surplus. The Department agreed with our assessment that INS enforcement is unlikely to significantly reduce the availability of agricultural labor, either regionally or nationally.

Labor also noted the potential of the implementation of the work requirements of the recent welfare reform legislation to provide agricultural labor. Labor disagreed with the assertions of some of those we interviewed that welfare recipients were unlikely to provide a source of farm labor. In particular, the Department stated that the problems, such as

child care, that employers and former welfare recipients will confront as they seek employment in farm occupations are little different from the challenges facing employers and recipients in other industries and occupations. Furthermore, Labor rejected the notion that few recipients are located in or near many rural areas, contending that at least some rural areas have very large welfare populations that could serve as potentially significant sources of labor in close proximity to many agricultural establishments.

Although Labor believes that the three-quarter guarantee generally serves its intended purpose, Labor agreed that the structure of the three-quarter guarantee could result in employers' overestimating the contract period in the expectation that less work and lower earnings toward the end of the contract period will encourage workers to "abandon" employment and thereby relieve the employer of the obligations of the three-quarter guarantee and return transportation reimbursement. Labor agreed to evaluate possible solutions to this problem but believed that, given fluctuations in the amount of work required during a growing season, applying the guarantee on an incremental basis may not be the most appropriate solution. In response to Labor's comments, we amended the recommendation to say that regulations should be revised to apply the three-quarter guarantee to remove incentives to overestimate the contract period. Revisions Labor considers should, however, include applying the guarantee incrementally during the duration of the H-2A contract in a manner that would improve the protection afforded to H-2A workers but also minimize any additional administrative burden on agricultural employers.

Labor also suggested that we revise our recommendation regarding authority to suspend employers with serious labor standard or H-2A contract violations. The Department suggested that we extend authority to the Wage and Hour Division of ESA rather than transferring it from ETA; we revised the recommendation accordingly.

USDA Had Multiple Concerns With Report Findings, Conclusions, and Recommendations

Although USDA agreed with some of our findings, conclusions, and recommendations, it submitted detailed comments on aspects of the draft report that it believed either were inaccurate or required clarification. These comments can be grouped into several broad areas concerning (1) our analysis of conditions in agricultural labor markets; (2) the magnitude and consequences of INS enforcement operations; (3) our assessment of H-2A program operations, specifically late filing of

applications; and (4) the effectiveness of protections covering both domestic and H-2A workers, specifically the three-quarter guarantee and the application processing deadlines.

USDA Suggested That Many Agricultural Employers Have Difficulty Attracting Qualified Labor

Although USDA did not explicitly disagree with our finding that widespread labor shortages do not now exist, it contended that the central issue is whether an adequate supply of qualified U.S. workers is currently available to agricultural employers. USDA stated further that U.S. agriculture's dependence on illegal aliens is poor policy and that programs like H-2A that permit "the employment of legal [nonimmigrant foreign] workers under controlled conditions" are preferable. Consistent with the notion that qualified domestic farmworkers may not now be available, USDA questioned our use of county unemployment rates as an indicator of labor market conditions and noted that our data on the unemployment rates of farmworkers failed to account for regional mismatches in farm labor supply and demand. USDA also provided information that it believes suggests that sufficient numbers of qualified workers are not available for agricultural employers, including 1987 data on characteristics of the national farm labor supply, and excerpts from a 1988 GAO report that analyzed labor market conditions for tobacco growers in selected counties in Virginia and North Carolina.⁴⁰

Information provided by USDA does not alter our assessment that the overwhelming weight of the evidence indicates that widespread farm labor shortages do not exist now and are unlikely to occur in the near future. USDA's rejection of consideration of annual and monthly unemployment rates as an indicator of labor market conditions contradicts the position of the Department during our review, when it concurred with our use of such data. Moreover, USDA relies on such data in determining whether various jurisdictions, including agricultural areas, are essentially labor-surplus areas and thus should receive waivers of the work requirement for food stamp eligibility.

Furthermore, our analysis of national and county unemployment rates was only one piece of evidence we analyzed to assess the condition of agricultural labor markets throughout the nation. We also reviewed changes in real wage rates, investment patterns by agricultural employers, and federal and state agency assessments of labor market conditions in agricultural areas. In addition, we made a serious effort to present the

⁴⁰See The H-2A Program: Protections for U.S. Farmworkers (GAO/PEMD-89-3, Oct. 21, 1988).

analytical difficulties of the concept of a labor market shortage and weaknesses associated with the evidence presented.

We also note that, although in this report we included only the annual unemployment rate for 20 major agricultural counties, we also reviewed monthly unemployment rates from January 1994 through June 1997 for these counties. As we reported, 15 of these counties had unemployment rates above 7 percent for every month during this entire period, even during peak periods of agricultural activity. Many of these counties, for example, Yuma, Arizona, and Yakima, Washington, had rates far in excess of 7 percent for every month during the period. On the basis of this analysis, we believe that it is plausible to conclude that such agricultural areas, which have high unemployment even during peak periods of agricultural activity, do not have labor shortages. This conclusion is also consistent with the anecdotal information we received from our interviews with agricultural employers around the country, who, while expressing concern about the availability of labor in the future, had not yet experienced a labor shortage.

USDA also presented data from 1987 suggesting that a considerable proportion of the agricultural labor force is casual, for example, housewives and students, who presumably do not have a strong attachment to the labor force. Although these may be the latest data available, they are over 10 years old, before the legalization of over 1.3 million SAW workers and the full implementation of the H-2A program as specified in IRCA. It is unclear what percentage of the current agricultural labor force is composed of such groups. Furthermore, casual workers like students and housewives would not contribute to the seasonal fluctuation in the unemployment rates of agricultural areas, since presumably many return to school or other activities in the off-season and thus do not actively seek work at that time.

These data are also relevant to the issue that USDA raises concerning the number of qualified workers in the agricultural labor force. Although it is clear that a substantial portion of the agricultural labor force is not legally authorized to work in this country, we were unable to determine the distribution of such workers throughout the country. We were also unable to assess the distribution of other sources of domestic workers, such as welfare recipients and unemployed or underemployed farmworkers who may have the skills for agricultural employment. USDA's identification of students and housewives represents another pool of potentially qualified labor that could be tapped by agricultural employers. Given the limited

effect of INS enforcement operations, it is most likely that the number of workers not legally authorized to work in this country will change slowly in many parts of the country. The pace of change will potentially permit agricultural employers and federal and state authorities to substitute other domestic labor where available, if they pursue this option, or, where necessary, to use the H-2A program.

As additional evidence concerning the ability of agricultural employers to recruit qualified domestic farmworkers, USDA also cited our 1988 report, which included an analysis of the agricultural labor market supply in the production of tobacco in selected counties in Virginia and North Carolina. The qualitative information from the targeted case study analysis of selected tobacco-growing counties in two states complements the extensive quantitative data in this report. In this report, we discuss the potential for localized labor shortages in specific crops under current labor market conditions and, consistent with our earlier work, cite difficulties agricultural employers may have now in obtaining domestic tobacco workers in North Carolina. We also note that tobacco producers in Virginia and North Carolina, the crop and geographic area we focused on in our 1988 report, are now significant participants in the H-2A program. Our finding that certain H-2A program requirements, including the positive recruitment requirement, do not appear to be accomplishing their intended purpose echoes our 1988 study, in which we concluded that “there were shortcomings in the protections of U.S. workers in the recruitment process.”⁴¹ That report also made recommendations to the Labor Department on how to enhance the effectiveness of this requirement.

We believe that it is inappropriate to use our 1988 limited case study analysis to generalize about the current availability of sufficient supplies of qualified farm labor on a national level. Major events that can influence the availability of farm labor, including the full integration of 1.3 million SAW workers, welfare reform, and the mechanization of the Florida sugarcane industry, have transpired since that time. In this respect, we suggest that our current quantitative analysis of key market indicators, coupled with our numerous in-depth interviews with agricultural employers, associations, and other interested parties, provides a more reliable assessment of current farm labor market conditions.

⁴¹GAO/PEMD-89-3, Oct. 21, 1988, p. 75.

USDA Raised Concerns About the Impact of INS Enforcement Operations

USDA raised several concerns related to INS enforcement operations, which we considered. Our analysis, however, indicated no need to revise the draft report in response.

USDA agreed with our finding that INS enforcement efforts are not likely to significantly reduce the availability of agricultural labor. However, USDA points to the impact INS efforts can have on individual agricultural employers, a point we also make in the report. While we agree that INS enforcement efforts may have an impact on individual agricultural employers, there is no evidence that it will cause a widespread farm labor shortage. USDA discusses INS enforcement activity directed at employers and at “conducting roadblocks, sweeps of shopping centers . . . and other places they [INS] expect aliens to be found,” but this activity is not new and is limited in scope. As discussed in chapter 2, such INS enforcement activity is included in the responsibilities of the 304 staff years devoted to noncriminal investigations, or an average of about 6 INS staff years per state.

While USDA cites the efforts of INS’ Border Patrol to “seal the border,” the extent to which these efforts have reduced the availability of illegally authorized workers is unclear. As we recently reported, INS intelligence reports and other available data do not indicate whether the increased difficulty of entry in the areas of highest known illegal activity on the southwest border of the United States has deterred the flow of illegal workers into the country. Apprehension statistics are INS’ primary quantitative indicator of the results of INS’ strategy to deter illegal entry along the southwest border. Apprehension data, standing alone, however, have limited value for determining how many aliens have crossed the border illegally. Data were unavailable, for example, on whether there has been a decrease in attempted reentries by those who have previously been apprehended. For a more detailed description on the difficulties in accurately measuring the total number of illegal aliens in the United States and in estimating how many illegal aliens come into this country each year, see Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed (GAO/GGD-98-21, Dec. 11, 1997). USDA also cites Labor’s enforcement activities as potentially reducing the Labor supply. INS, and not Labor, has responsibility for identifying workers not legally authorized to work. Labor’s enforcement responsibility is limited to ensuring that employers have collected documents relating to authorization to work; Labor does not verify the authenticity of the documents collected.

USDA stated that “INS often determines, through procedures not available to employers, that 75 percent or more of an employer’s work force submitted fraudulent documents.” We agree that while it is possible that INS has determined that 75 percent or more of an employer’s workforce submitted fraudulent documents, INS cannot provide information on the frequency with which this occurs. INS does not collect data on the percentage of an employer’s workforce in all industries or in specific industries, such as agriculture, found to have fraudulent documents. INS officials stated that the percentage of such workers varies greatly from one employer to another. For example, information INS provided in response to our requests for information about specific individual enforcement efforts showed one employer with only 1 percent of workers with fraudulent documentation and another with 50 percent.

USDA also stated that

“Workers who claim to be U.S. citizens and possess fraudulent documents are liable to be detected by the Social Security Administration (SSA). SSA requires employers to verify through its Enumeration Verification System the names and social security numbers that do not agree with SSA records (if the Wage and Tax statements filed by the employer has an error rate that exceeds ten percent.)”

Instead, SSA officials stated that while employers are encouraged to use the Enumeration Verification System, they are not required to do so. When the name and Social Security number do not agree, SSA places the record in the Earnings Suspense File. It sends a letter to the employee at the address that is on the W-2 form and asks the employee for a correction. SSA only contacts the employer if the address is incomplete or missing. SSA has a task force examining ways to better use the Suspense File, including the possibility of requiring employer use of the Enumeration Verification System.

USDA Questioned INS Visa Petition Approval Only After Labor Certification

USDA questioned our finding that Justice authorizes the State Department to issue nonimmigrant visas for H-2A workers only after the Department of Labor issues a labor certification, with reference to the statutory requirement that the certification be applied for, but not specifically obtained, before INS petition approval. In response to this concern, INS stated that “the INS will NEVER approve a new H-2A petition unless the petition is accompanied by a labor certification issued by the U.S. Department of Labor. The fact that a prospective employer has filed for a cert with the Department of Labor is insufficient.”

USDA Questioned Significance of Employers' Filing Applications Fewer Than 60 Days Before Date of Need

USDA questioned how many of the 42 percent of applications employers filed fewer than 60 days before the date of need were actually late, rather than emergency, applications. USDA said that "[t]he Department of Labor rejects late-filed applications." We agree with USDA that it would be inappropriate to characterize emergency applications filed fewer than 60 days prior to date of need as "late." However, our review of H-2A applications in one regional office that processes a large number of H-2A applications confirmed Labor officials' statements that emergency applications represent only a small fraction of all applications. In fact, data for the period October 1, 1996, through June 30, 1997, the only period for which these data were collected in this region, identified fewer than 15 percent of the applications filed within the 60-day period as "emergency."

Furthermore, Labor does not reject nonemergency applications because they were filed with fewer than 60 days remaining. Our analysis showed that for the period October 1, 1995, through June 30, 1997, Labor approved 99 percent of all such applications, the same percentage approved for applications filed within the statutory deadline. In addition, despite having fewer than 60 days, Labor issued certifications for 76 percent of these applications at, or before, the date of need.

We agreed with USDA that an agricultural employer who experiences an unexpected labor shortage as a result of INS enforcement activity would be eligible for an emergency certification. Both our draft and final report refer to a specific labor certification issued for just this reason in the Northeast.

USDA Disagreed With Findings on the Three-Quarter Guarantee

Unlike Labor, USDA disagreed with our conclusion that the three-quarter guarantee does not provide incentives to ensure that the employer makes the worker stay through the end of the contract period, and that it may provide disincentives to accurately estimate the end date of the contract period. USDA asserted that "there is significant incentive for the employee to stay and collect 3/4 wages without working, receive the return transportation, and maintain eligibility to return to the job the following season." However, USDA also quoted the manager of a major H-2A association as saying that 1,598 of 4,573 (more than one-third) of the association's H-2A workers chose not to complete the contract period. In addition, USDA uses the case of a sheepherder who "had not received regular wages when due" to refute our assessment of the difficulty in enforcing the three-quarter guarantee provision. However, in citing this

case, USDA stated that “[the shepherd] subsequently worked for a series of H-2A employers and it may be that his total employment did not meet the 3/4 guarantee. The unresolved dispute is which of the series of employers owe a 3/4 guarantee and how is the liability to be apportioned between them.” The situation USDA describes is one of the difficulties inherent in enforcing the three-quarter guarantee, raising concerns about the application of the provision to H-2A workers who are brought into the country through associations that may move the worker from one employer to another during the course of the contract.

In response to anecdotal information USDA included in its response to our draft report, we conducted limited follow-up interviews, including interviewing the employer, employer’s agent, and Labor officials involved in an H-2A application from Arkansas. While the individuals interviewed disagreed on some of the facts of the case, the interviews served to confirm our concern about the extent to which H-2A contract periods were accurately estimated. Specifically, the grower told us that the workers were only needed through the middle of August while the job order and H-2A application identified the expected period of employment to last until December 31. Furthermore, our discussions with the ETA certification official raised concerns about requirements for positive recruitment under emergency applications.

USDA Commented on Recommendations Regarding Changing Application Processing Deadlines

USDA officials agreed that the 60-day time requirement for filing H-2A labor certification applications is problematic in that it is difficult for employers to precisely estimate their date of need 60 days in advance and that it may limit the success of recruiting domestic workers who are currently employed. USDA also agreed with our conclusion that INS’ role in the petition process is unnecessarily burdensome and supported our recommendation that the H-2A application process be reduced from 60 to 45 days. However, USDA objected to our recommendation to amend the Immigration and Nationality Act so that, as long as the authority for approval of H-2A visa petitions remains with Labor, Labor would be required to complete all applications at least 7 days before the date of need, rather than 20 days. We recommend that the total H-2A application process be reduced to 45 days in combination with reducing the certification requirement to 7 days to maintain the period of time Labor has to certify the labor shortage. This maintains the existing period of time available for recruitment of domestic workers. We disagree with USDA’s statement that “the certification date has no bearing on the opportunities for domestic workers because positive recruitment is required both before

and after certification.” Under current regulations, employers must provide evidence that they have complied with the positive recruitment requirements set forth in Labor’s acceptance of the H-2A application. Labor reduces the number of H-2A openings certified on the basis of information the employer provides on the results of positive recruitment efforts, adjusted for estimates of the number of workers who will not report for work. Positive recruitment efforts after the certification have no bearing on the number of H-2A openings approved.

USDA expressed concern that the remaining 7 days do not allow enough time for H-2A workers to obtain visas and travel to the worksite. Our recommendation does not reduce the time allowed for this step in the process. Under current law, workers cannot obtain visas until employers have processed visa petitions through INS within the 20 days allowed. As we reported, estimates of the time required to process petitions through INS can reduce the remaining time to fewer than 7 days.

Primary Congressional Contacts in Addition to Report Addressees

United States Senate

The Honorable Susan M. Collins
The Honorable Larry E. Craig
The Honorable Lauch Faircloth
The Honorable Slade Gorton
The Honorable Jon Kyl
The Honorable Frank R. Lautenberg
The Honorable Jack Reed
The Honorable John D. Rockefeller IV
The Honorable Ron Wyden

House of Representatives

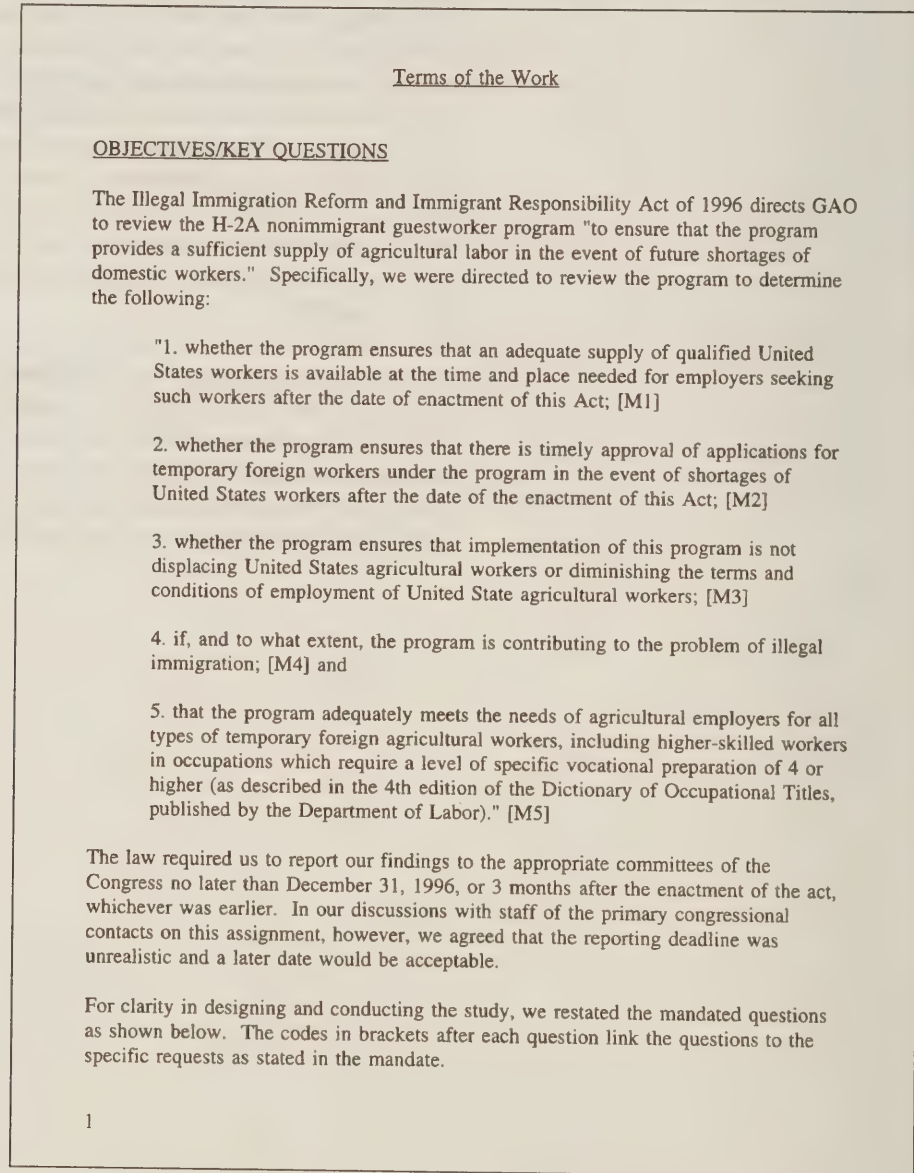
The Honorable Howard L. Berman
The Honorable Elton Gallegly
The Honorable Bob Goodlatte
The Honorable Steven C. LaTourette
The Honorable Richard W. Pombo
The Honorable Lamar Smith

Objectives, Scope, and Methodology

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and the Omnibus Consolidated Appropriations Act, 1997, mandated that GAO review various aspects of the H-2A nonimmigrant guestworker program. In discussions with congressional staff, we agreed to combine the two mandates and restate the questions. The restated questions, which were distributed to the relevant committees and key congressional contacts on the terms of work, are reprinted here. The terms of work include codes in brackets after each question—for example, [M1] and [M2]—to provide a link from the questions to the specific requests in the IIRIRA mandate.

For reporting purposes, we combined these questions into two broader questions: evaluate (1) the likelihood of an agricultural labor shortage and its impact on the need for nonimmigrant foreign guestworkers and (2) the H-2A program's ability to meet the needs of agricultural employers while protecting domestic and foreign agricultural workers, both now and if a significant number of foreign guestworkers is needed in the future.

Figure II.1: Terms of the Work



1. How do federal and state agencies administer the H-2A program to respond to temporary, seasonal agricultural labor shortages? [M1, M2, M3, M4, M5]

1.1 What procedures does Labor use to certify employers for the H-2A program in a timely manner, including confirming employers' efforts to identify and recruit U.S. workers? [M1, M2, M5]

1.2 What procedures do the Immigration and Naturalization Service (INS) and the Department of State use to approve and issue visas for H-2A workers in a timely manner, including current safeguards to ensure workers' departure upon completion of employment? [M2, M4, M5]

1.3 On the basis of our analysis agency data, to what extent do agencies certify employers in a timely manner, including employers with expedited applications? [M1, M2]

1.4 What H-2A procedures do Labor, INS, State, the Department of Agriculture, and state job service agencies use to protect the wages and working conditions of H-2A and non-H-2A farmworkers, including ensuring that H-2A workers do not displace qualified domestic workers? [M3]

1.5 What procedures are available to employers as well as H-2A and non-H-2A workers to obtain redress in a dispute? [M2, M3]

2. What are the characteristics of employers and workers participating and not participating in the H-2A program and how have these characteristics changed over time? [M1, M2, M3, M4, M5]

2.1 What are the characteristics of H-2A and non-H-2A employers by size, geography, and agricultural commodity? [M1, M2, M5]

2.2 What are the characteristics of H-2A and non-H-2A workers by nationality, gender, age, skill level, and--for non-H-2A workers--immigration status? [M1, M2, M3, M4, M5]

2.3 How have these characteristics changed since the 1980s, and what factors may have contributed to these changes? [M1, M2, M3, M4, M5]

3. What problems, if any, did we identify in the current H-2A program? [M1, M2, M3, M4, M5]

3.1 What are the problems, if any, with the procedures Labor uses to certify employers for the H-2A program? [M1, M2, M5]

3.2 What are the problems, if any, with the procedures used by INS to approve and State to issue visas to H-2A workers to meet certified employers' needs, including current safeguards to ensure workers' departure upon completion of employment? [M2, M4, M5]

3.3 What are the problems, if any, with procedures to protect the wages and working conditions of H-2A and non-H-2A workers and the employment security of domestic workers? [M3]

3.4 What are the problems, if any, with the procedures available to employers as well as H-2A and non-H-2A workers to obtain redress in the event of a dispute? [M2, M3]

3.5 What problems, if any, prevent the current program from meeting the needs of agricultural employers for skilled workers? [M5]

4. What is the likelihood of an agricultural labor shortage in the near future? [M1, M2]

4.1 On the basis of our analysis of recent studies and available data, what is the approximate percentage of illegal workers in the agricultural workforce? [M1]

4.2 To what extent are INS' planned enforcement efforts likely to affect the availability of agricultural workers? [M1]

4.3 To what extent would domestic workers be available to fill job openings created by INS enforcement activities? [M1, M2]

5. What would be the potential difficulty, if any, in expanding the current H-2A program in response to a significant labor shortage? [M1, M2, M3, M4, M5]

5.1 What are Labor's, INS', and State's plans to respond, if necessary, to an agricultural labor shortage, and how do these plans change depending on the magnitude or geographic location of the shortage? [M1, M2, M3, M4, M5]

5.2 What are employers' and labor advocates' perspectives on the feasibility of successfully implementing these plans? [M1, M2, M3, M4, M5]

5.3 What are employers' and labor advocates' perspectives on the likely effect of these contingency plans, if implemented, on

- ensuring an adequate supply of farm labor,
- maintaining labor protections currently afforded to H-2A and non-H-2A agricultural workers, and
- preventing an increase in illegal immigration? [M1, M2, M3, M4, M5]

SCOPE

Our work will be based on analysis of program data from the Departments of Agriculture, Labor, Justice, and State. Examples include statistics on INS enforcement efforts and Labor's National Agricultural Workers Survey (NAWS) and wage data from the Department of Agriculture. We will also address our study objectives by analyzing the views of pertinent experts and program officials, grower associations and individual growers, workers, and farm labor advocates. We will obtain this information through both on-site visits and telephone interviews.

METHODOLOGY

During the planning phase of our study, we obtained and analyzed some program data and interviewed headquarters officials in the Departments of Labor and Agriculture and INS and about 90 growers and farmworker advocates individually or in groups.

During the next phase, we will complete our collection and analysis of program and other data, examination of pertinent documents, and interviews with knowledgeable individuals. For example, we will collect and analyze certification, enforcement, and other data on the H-2A program, including data from Labor on H-2A certifications and from INS on general enforcement activity. We will collect data on the adverse effect wage rates for each state and the characteristics of the American fruit, vegetable, and horticultural industry from Agriculture. We will review data profiling U.S. agricultural field labor from Labor's NAWS and analyze the methodology of that survey. We will also interview Labor, INS, Agriculture, and State officials and state job service officials to better understand the operation of the current H-2A program and to obtain their views on these operations. We will also obtain from these agencies their contingency plans for responding to any potential increases in the demand for H-2A workers and their views on the likelihood of a labor shortage that would substantially increase such demand.

We will interview additional employers and employer associations that represent H-2A and non-H-2A participants, farmworker advocates, H-2A and non-H-2A workers, and academic experts to obtain their views on the strengths and weaknesses of the H-2A program, including any potential impediments to the program's ability to respond quickly to a labor shortage, and on the potential for future agricultural labor shortages. We will also obtain their views on how well the agencies' contingency plans for responding to a shortage would ensure an adequate supply of labor while protecting the rights of farmworkers.

We will coordinate our work with Labor's Office of the Inspector General as it continues its own investigation of the H-2A certification process.

PRODUCT TYPE

Report

PRODUCT DELIVERY DATE

We will provide the report no later than December 31, 1997.

REPORTING ON JOB STATUS

We will meet periodically with staff from our primary congressional contacts to keep them abreast of our progress on this assignment. We expect this to include a progress briefing in June 1997.

Methodology

To address these questions, we (1) interviewed federal and state officials and nongovernmental persons such as representatives of agricultural associations, labor advocates, and academic experts; (2) collected documents from federal and state agencies as well as private sources; (3) analyzed qualitative and quantitative data from federal and state

agencies and private employers; (4) reviewed published studies; and (5) conducted a legal review of the statutory and regulatory requirements of the H-2A program.

Interviews

To obtain information about each of the assignment's objectives, we interviewed pertinent Labor officials, including those within ETA's Employment Service and those responsible for overseeing the H-2A program; officials at OSHA; WHD; the Office of the Solicitor; and the Directorate of Policy. We also held discussions with regional Labor officials, including program monitor advocates and WHD staff.⁴² Throughout the assignment, we coordinated our efforts with staff from Labor's Office of Inspector General (OIG), who are currently conducting a review of the U.S. Employment Service role in facilitating the H-2A guestworker program.⁴³ We also held discussions with state program monitor advocates and officials who conduct the H-2A program housing inspections. In addition, we interviewed state job service and health department officials in the three states that used the most H-2A workers in 1996—North Carolina, New York, and Virginia—and the state producing the largest dollar value in agriculture—California.

We conducted discussions with officials at USDA and the State Department including officials at several consulate offices located in Mexico and officials from INS' investigations offices and the Border Patrol. To assess the potential of serious labor shortages occurring from enhanced INS and border patrol enforcement efforts at agricultural worksites, we interviewed INS officials at their Office of Statistics and Office of Enforcement, regional offices, and INS processing centers; and with Border Patrol officials at headquarters and in the regions to identify their official enforcement targeting priorities and the current level of enforcement resources directed to agriculture. We also observed a typical INS enforcement operation at a worksite in Woodstock, Virginia.

⁴²In response to a 1974 district court decision (*NAACP v. Labor*), Labor's Employment Service was required to create a group of monitor advocates—individuals charged with monitoring the treatment of farmworkers by state job services to ensure equitable treatment as well as to advocate for the improvement in the employment and working conditions of farmworkers. These monitor advocates were assigned to each of Labor's 10 regions throughout the country, and each state job service was to provide for a network of such advocates throughout the agency.

⁴³Among other issues, the OIG is reviewing Labor's adherence to agency procedures regarding the H-2A program's statutory and regulatory affirmative recruitment requirements. The OIG expects to complete its work by April 1998. We coordinated our efforts with the OIG's office to minimize duplication in our data collection efforts and to reduce any administrative burden caused by our reviews on federal and state agencies and private employers.

We met with a wide variety of agricultural employers, workers, and advocates. We interviewed 12 H-2A growers distributed across six states and 35 non-H-2A growers distributed regionally across nine states. These growers represented a wide array of agricultural activities, including fruit, tree nut, vegetable, tobacco, and tree nursery production, and sheep ranching. We also interviewed officials from 28 agricultural employer associations throughout the country, including the National Council of Agricultural Employers, the national office and selected state chapters of the American Farm Bureau Federation, and regional organizations like the Florida Fruit and Vegetable Association and the Nisei League. We also met with agricultural associations that file H-2A applications as joint employers, including the North Carolina Growers Association, the Virginia Agricultural Growers Association, the New England Apple Council, and others. We interviewed over 30 farmworkers, both H-2A and non-H-2A, and visited numerous agricultural worksites. We held discussions with 18 farm labor advocates from 15 states throughout the country, including representatives of the Farmworker Justice Fund, unions such as the United Farm Workers, church groups, and community organizations.

We conferred with a number of experts on farm labor and immigration issues, including economists, legal experts, research methodologists from academia, and researchers and officials associated with the 1992 Commission on Agricultural Workers and the U.S. Commission on Immigration Reform. We consulted with several of these experts throughout the assignment to facilitate our understanding of the H-2A program's operation and other key issues.

Document Review

We collected and reviewed documents on the H-2A program's procedures, including its application forms and requirements, implementing regulations, and procedures for filing appeals of adverse rulings. We obtained documents from ETA specifying those counties and other jurisdictions of the country that had been designated as "labor surplus" areas and the criteria used for such designations. We collected documents from INS on its enforcement priorities and its procedures for approving H-2A applications. We obtained resource data from Labor on the H-2A program and from INS on its enforcement efforts and H-2A-related activities. We also obtained information on areas of the country that had received waivers from the Secretary of Agriculture from the modifications

in food stamp eligibility as specified in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.⁴⁴

Data Analysis

We collected and analyzed data from a number of different sources, as follows:

- Labor's National Agricultural Workers Survey (NAWS). Since 1988, NAWS has collected detailed information on the basic demographics, legal status, education, family size and household composition, wages, and working conditions of seasonal agricultural services workers, including their participation in the nonagricultural U.S. labor force.⁴⁵ NAWS also collects information on hourly and piece-rate wage rates, farm labor housing, health care, and many other aspects of field labor working conditions.
- USDA's National Agricultural Statistics Service (NASS). We collected and analyzed data on hourly and piece-rate wage rates, and total employment for field and all hired agricultural workers from the late 1980s to July 1997, the most recent period available. We also analyzed data on various agricultural characteristics of U.S. counties, including the total number of farms, their distribution by the amount of annual sales and acreage, and time series data on total acreage, and value of production and tonnage for fruit, tree nut, vegetable, and floracultural production. We also analyzed data on the total value of production in fruits, tree nuts, vegetable nurseries, and greenhouse production for the 100 counties with the largest dollar value of production in each of these areas.
- Labor's Bureau of Labor Statistics (BLS). We analyzed BLS data on monthly and annual unemployment rates for 20 counties with high fruit, tree nut, and vegetable production as measured in dollars, for states and the nation, for 1994 through June 1997. We also collected and reviewed annual and

⁴⁴Section 6(o) of the Food Stamp Act, as amended by section 824 of the Personal Responsibility and Work Opportunity Act, provides that, among other criteria, an individual is ineligible for the program if he or she previously received benefits but did not work an average of 20 hours per week for at least a 3-month period. However, the provision also says that, on the request of a state agency, the Secretary of Agriculture may waive these provisions for any group of individuals in the state if the Secretary determines that the area in which the individuals reside has an unemployment rate of over 10 percent or does not have sufficient numbers of jobs to employ the individuals.

⁴⁵Three times annually, NAWS surveys a random sample of about 2,500 of the nation's crop farmworkers. To ensure regional coverage, NAWS uses site area sampling to obtain a nationally representative cross section of field workers. To incorporate seasonal sensitivities, three 6- to 8-week survey cycles are conducted, in January, May, and September of each year. Site selection and interview allocations are proportional to seasonal payroll size. NAWS obtains employer names from various government sources and generates a random sample of agricultural employers for each of the selected sites. NAWS representatives contact selected employers to obtain access to the worksite. Interviewers visit the worksite and ask a random sample of workers to participate. Interviews occur at workers' homes or at worker-selected locations. See Department of Labor, Office of the Assistant Secretary for Policy, *A Profile of U.S. Farmworkers: Demographics, Household Composition, Income and Use of Services* (Washington, D.C.: Department of Labor, Apr. 1997).

monthly unemployment rates for agricultural wage and salary workers from January 1948 through September 1997.

- Justice's INS enforcement action data. We analyzed data on all INS enforcement actions conducted since 1994 to determine the number of actions targeted to agricultural worksites and how that number has changed over time. We also analyzed INS data regarding the number of H-2A program participants who overstayed their contract period for 1994 through 1996.
- Labor's H-2A program certification processing data. We analyzed data on all H-2A applications processed by each of Labor's regional offices, including the number of workers requested, the date of application and certification, the number of the petitioning grower associations and the individual growers they represent, and other information. We analyzed these data to determine the percentage of all certifications that did not meet all statutory and regulatory time requirements. For those applications determined to be late, we contacted the individual regional office to identify and analyze the reasons for the delay. We also obtained data from H-2A program officials at headquarters on the number of applications and employers by crop, by state, and by number of workers requested.
- States' visa data. We analyzed data on the number of H-2A visas issued by country of origin for fiscal years 1987 through 1997.
- Association data. We analyzed detailed data obtained from Labor's OIG on the operations of a large provider of H-2A workers. These data include details on the employers who obtain workers from the association, and on both domestic and H-2A workers for the 1996 season.

Literature Review

To address issues concerning the status of the national agricultural labor market and the potential for a national labor shortage, we reviewed pertinent literature on the definition and measurement of labor shortages generally; consulted with economists familiar with local and national agricultural labor markets; and conducted interviews with officials from Labor and USDA, farm labor advocates, agricultural employer associations, and individual growers. We also reviewed the literature on the history and role of guestworkers in American agriculture and the implications of such programs for national immigration policy.

Legal Analysis

We reviewed existing statutory and regulatory requirements to identify any potential impediments that could constrain the H-2A program from expanding or operating quickly in an emergency situation. We also

conducted a legal review of the program's general certification process, its appeals procedure, and the rights and remedies available to H-2A and non-H-2A workers.

Economic Data on U.S. Farmworkers and Agricultural Production

This appendix contains data on various economic characteristics of U.S. farmworkers and agricultural production, including total employment rates, average hourly and piece-rate wages, annual and monthly unemployment rates for the nation and selected states and counties, total acreage, and the value of certain types of agricultural production. We also present information on selected areas of the country that received waivers from USDA as a result of recently enacted legislative changes in food stamp eligibility.

Appendix III
Economic Data on U.S. Farmworkers and
Agricultural Production

Table III.1: Annual and Monthly Unemployment Rates for 20 Counties With Significant Production in Fruits, Tree Nuts, and Vegetables, 1994-96 and June 1997

Numbers in percent

Geographic area	Average annual unemployment rate			Monthly unemployment rate
	1994	1995	1996	June 1997
County^a				
Fresno County, Calif.	13.8	14.1	13	12.4
Imperial County, Calif.	26.2	29.3	29.4	24.6
Kern County, Calif.	14.7	13.9	12.7	11.4
Madera County, Calif.	14.8	15	14.1	13.4
Merced County, Calif.	15.5	17.1	16.2	14.1
Monterey County, Calif.	12.1	12.4	11	7.2
Riverside County, Calif.	10.5	9.5	8.2	7.2
San Diego County, Calif.	7	6.4	5.3	4.4
San Joaquin County, Calif.	12.6	12.3	11.2	10.8
Santa Barbara County, Calif.	7.2	6.7	5.7	4.1
Stanislaus County, Calif.	15.7	15.5	14	13.5
Tulare County, Calif.	16	16.8	15.9	13.9
Ventura County, Calif.	7.8	7.5	7.1	5.9
Collier County, Fla.	8.2	7	5.8	5.9
Dade County, Fla.	8.4	7.4	7.3	7.8
Hendry County, Fla.	16.7	15.1	13.9	19.5
Palm Beach County, Fla.	8.8	7.2	6.7	6.9
St. Lucie County, Fla.	14.3	12.4	12.2	11.6
Yuma County, Ariz.	32.1	29	31	32.7
Yakima County, Wash.	11.7	12.6	13.4	8.1
State				
California	8.6	7.8	7.2	6.3
Florida	6.6	5.5	5.1	5.2
Arizona	6.4	7.8	5.5	4.9
Washington	6.4	6.4	6.5	4.7
Country				
United States	6.1	5.6	5.4	5.2

^aAs of 1992, the latest year for which data were available from USDA, these 20 counties accounted for over 50 percent of the dollar value of all fruit and tree nut production in the United States, 47 percent of the dollar value of all vegetables, and 16 percent of the total national dollar value of nursery and greenhouse production.

Appendix III
Economic Data on U.S. Farmworkers and
Agricultural Production

Table III.2: Food Stamp Waiver and Labor Surplus Area Designations for 20 Counties With Significant Production in Fruits, Tree Nuts, and Vegetables, 1997

County^a	Scope of food stamp eligibility waiver^b	Reason for USDA waiver^c	Scope of labor surplus area designation,^d fiscal year 1997
Fresno County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Imperial, County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Kern, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Madera County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Merced County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Monterey County, Calif.	Entire county	Over 10 percent unemployment rate	Excludes cities of Monterey and Salinas
Riverside County, Calif.	Entire county	Insufficient jobs	Excludes city of Palm Desert
San Diego County, Calif.	Cities of Chula Vista, El Cajon, Imperial Beach, Lemon Grove, National City, Oceanside, and Vista	Insufficient jobs	Not designated as labor surplus area
San Joaquin County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Santa Barbara County, Calif.	Lompoc City, Santa Maria	Insufficient jobs	Not designated as labor surplus area
Stanislaus County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Tulare County, Calif.	Entire county	Over 10 percent unemployment rate	Entire county
Ventura County, Calif.	Entire county	Insufficient jobs	Excludes cities of Camarillo, Moorpark, Simi Valley, Thousand Oaks, and Ventura
Collier County, Fla.	Entire county	Insufficient jobs	Entire county

(continued)

**Appendix III
Economic Data on U.S. Farmworkers and
Agricultural Production**

County^a	Scope of food stamp eligibility waiver^b	Reason for USDA waiver^c	Scope of labor surplus area designation,^d fiscal year 1997
Dade County, Fla.	Entire county	Insufficient jobs	Excludes entire county except for cities of North Miami, Hialeah, Homestead, Miami Beach, and Miami
Hendry County, Fla.	Entire county	Over 10 percent unemployment rate	Entire county
Palm Beach County, Fla.	Entire county	Insufficient jobs	Excludes cities of Boca Raton, Jupiter, and Palm Beach Gardens
St. Lucie County, Fla.	Entire county	Over 10 percent unemployment rate	Entire county
Yuma County, Ariz.	Entire county	Over 10 percent unemployment rate	Entire county
Yakima County, Wash.	Entire county	Over 10 percent unemployment rate	Entire county

^aThese 20 counties accounted for about half of the total national value of production in fruits, tree nuts, and vegetables in 1992, the latest year for which data were available.

^bSection 6(o) of the Food Stamp Act, as amended by section 824 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, provides that, among other criteria, a person is ineligible for the program if he or she previously received benefits but did not work at least 20 hours per week for at least a 3-month period. However, the provisions also say that, on the request of a state agency, the Secretary of Agriculture may waive these provisions for specified persons in the state. USDA issued most of the waivers to the designated counties during early 1997.

^cThe Secretary of Agriculture may waive current food stamp eligibility provisions if he determines that the area in which the persons reside has an unemployment rate of over 10 percent or has an insufficient number of jobs to provide employment for program participants. Among other evidence, designation of an area by Labor as a labor surplus area can be considered by the Secretary that an insufficient number of jobs are available.

^dLabor classifies a civil jurisdiction as a labor surplus area when that jurisdiction's average unemployment rate is at least 20 percent above the average national unemployment rates during the previous 2 calendar years. During periods of high unemployment, an area can be classified as a labor surplus area if it has unemployment rates of 10 percent or more during the previous 2 calendar years. Labor may also designate areas if an area had unemployment rates of at least 7.1 percent for each of the 3 most recent months or projected unemployment of at least 7.1 percent for each of the next 12 months or has documentation that this has already occurred. Labor designates labor surplus areas on a fiscal-year basis. Designated labor surplus areas are eligible for preference in bidding on federal procurement contracts.

Sources: USDA and Department of Labor.

Appendix III
Economic Data on U.S. Farmworkers and
Agricultural Production

Table III.3: Average Hourly Wages of
Agricultural Workers, 1989-96

Year	NASS average annual hourly wage rate for field workers ^a	NASS average hourly wage for field workers, in constant 1996 dollars ^b	NAWS average annual hourly farm rate, all crop workers ^c	NAWS average hourly farm wage, all crop workers, in constant 1996 dollars
1989	\$5.12	\$6.48	\$5.24	\$6.63
1990	5.23	6.28	5.23	6.28
1991	5.49	6.32	5.56	6.41
1992	5.69	6.36	5.33	5.96
1993	5.90	6.41	5.45	5.92
1994	6.02	6.37	5.54	5.87
1995	6.13	6.31	5.89	6.06
1996	6.34	6.34	Not available	Not available
Percentage change, 1989-95	19.73	-2.7	12.40	-8.54

^aUSDA, NASS.

^bWages in constant 1996 dollars were calculated using the Consumer Product Index for all urban consumers (1982-84=100), modified to 1996 as the base year. See Economic Report of the President, table B-58 (Washington, D.C.: U.S. Government Printing Office, Feb. 1997). p. 365. NASS defines a field worker as an employee engaged in planting, tending, and harvesting crops, including operation of farm machinery on a crop farm. The NAWS definition of crop worker is comparable to NASS' definition of field worker.

^cData are from the Department of Labor, NAWS, 1989-95.

Table III.4: Average Hourly Piece-Rate
Wages of Agricultural Workers,
1989-95

Year	NASS average annual hourly piece-rate wages, all hired workers ^a	NASS average annual piece rate wages, all hired workers, in constant 1996 dollars	NAWS average hourly wages, crop workers receiving piece-rate compensation only ^b	NAWS average hourly wage rates, crop workers receiving piece-rate compensation only, in constant 1996 dollars
1989	\$6.65	\$8.41	\$6.86	\$8.68
1990	6.55	7.86	6.82	8.19
1991	6.43	7.41	7.52	8.66
1992	6.43	7.19	6.19	6.92
1993	6.42	6.97	6.81	7.39
1994	7.02	7.43	6.55	6.93
1995	7.03	7.24	7.01	7.22
Percentage change, 1989-95	5.71	-13.99	2.19	-16.86

^aNASS defines all hired workers as anyone other than an agricultural service worker who is paid for at least 1 hour of agricultural work on a farm or ranch. NASS defines a field worker as an employee engaged in planting, tending, and harvesting crops, including operation of farm machinery on a crop farm. Average annual hourly piece rates are those wages paid to employees in a piece-rate form of compensation. NAWS' definition of crop worker is similar to NASS' definition of field worker.

^bUnpublished data from the Department of Labor, NAWS, Oct. 1997.

^cWages in constant 1996 dollars were calculated using the Consumer Price Index for all urban consumers (1982-84=100), modified to 1996 as the base year.

Appendix III
Economic Data on U.S. Farmworkers and
Agricultural Production

Table III.5: Total Annual Acreage,
Tonnage and Dollar Value of National
Fruit and Vegetable Production, and
Numbers of Workers Employed,
1986-97

Year	Total acreage (in thousands)	Total production (short tons in thousands)	Total value of production (in millions)	Total peak employment, direct hired workers ^a
1986	5,752	46,712	\$9,983	1,233
1987	5,905	51,268	10,905	1,270
1988	5,953	51,465	12,330	1,200
1989	6,096	55,996	13,240	1,197
1990	6,139	53,971	12,649	1,106
1991	6,097	54,711	13,576	1,113
1992	6,071	55,808	13,890	1,032
1993	6,044	57,815	13,921	1,062
1994	6,282	61,846	14,025	1,047
1995	6,307	60,805	15,141	1,066
1996	b	b	b	1,015
1997	b	b	b	1,068
Percentage change				
1986-95	9.64	30.17	51.67	b
1987-97	b	b	b	-15.90

^aNumber of workers hired directly by agricultural employers as of July of each year. This column does not include agricultural service workers—workers hired through labor contractors. Including data on the peak employment levels of agricultural service workers results in a decline in total peak agricultural employment of about 6 percent to about 1.4 million between July 1986 and July 1997.

^bNot available.

Characteristics of H-2A Participants

Table IV.1 provides information on the number of H-2A workers entering the United States by country of origin from 1987 to 1996. In 1987, the majority of workers came from Jamaica. By 1996, the majority of workers came from Mexico.

Appendix IV
Characteristics of H-2A Participants

Table IV.1: H-2A Workers Entering the United States, by Country of Origin, Fiscal Year 1987-96

Country	1987	1988	1989	1990
Total, Africa				1
Total, Asia		8	14	19
Great Britain and Northern Ireland	2	39	12	16
Poland			16	15
Other		62	72	38
Total, Europe	2	101	100	69
Barbados	416	321	263	
Dominica	100	100	110	
Dominican Republic			16	16
Jamaica	11,414	12,609	12,051	13,881
Mexico		2,499	3,683	4,993
St. Lucia	562	565	580	
St. Vincent	552	550	620	
Other	67	29	38	
Total, North America	13,111	16,673	17,361	18,890
Australia			15	18
New Zealand			7	8
Total, Oceania			22	26
Chile				53
Peru			116	140
Other			1	1
Total, South America			117	194
Total	13,113	16,782	17,614	19,199

Appendix IV
Characteristics of H-2A Participants

1991	1992	1993	1994	1995	1996	Rate in percent for 1996	Total by country
	2	4	14	3	2	.01	26
140	15	27	7	5	3	.01	238
23	10	7	8	12	5	.03	134
37	53	10	11	18	31	.2	191
23	12	9	10	19	19	.1	264
83	75	26	29	49	55	.4	589
60							1,060
23							333
19	22	27	17	21	19	.1	157
10,815	8,355	6,099	5,697	4,483	4,231	27.8	89,635
6,216	5,829	6,655	7,156	7,744	10,353	67.9	55,128
209							1,916
290							2,012
81	23	16	34	9	14	.09	311
17,707	14,220	12,794	12,897	12,257	14,617	95.9	150,527
20	23	32	22	38	31	.2	199
68	103	74	98	97	74	.5	529
88	126	106	120	135	105	.7	728
53	81	73	57	72	70	.5	459
198	277	308	294	341	383	2.5	2,057
4	2	4					12
255	360	385	351	413	453	3.0	2,528
18,273	14,798	13,342	13,418	12,862	15,235		154,636

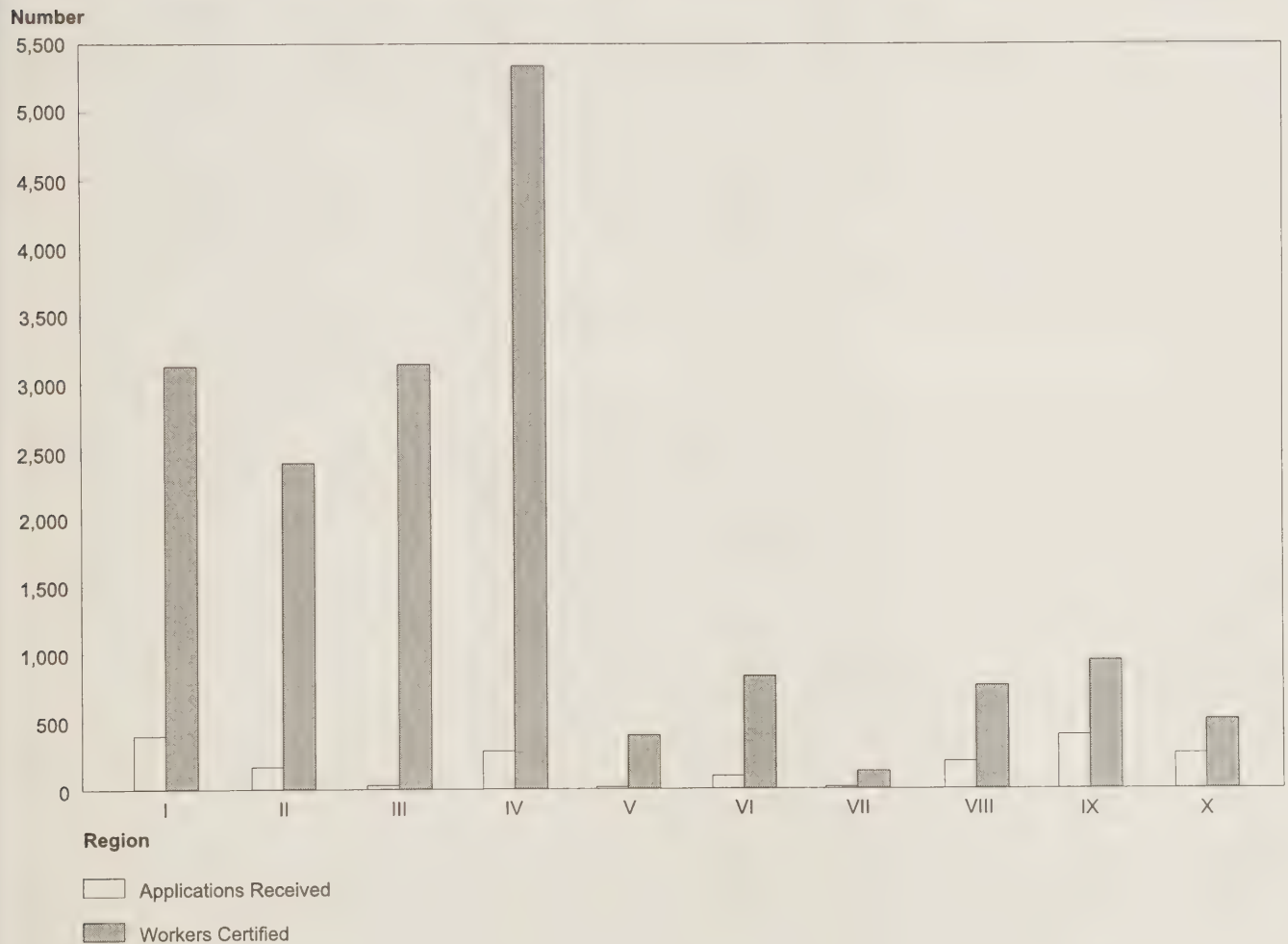
Note: These data include both H-2A workers receiving a visa from the Department of State and Caribbean H-2A workers organized by WICLO entering without a visa.

No data are available on the geographic distribution of H-2A employers or H-2A workers employed. However, we analyzed data on the distribution of H-2A applications and workers requested across the country to obtain a general picture of where employers are located and where workers are going. (See table IV.2.) Applications are often filed for groups of employers but must be filed with the ETA region where the worker is to be employed. Workers certified does not equal the number of H-2A workers employed because employers may not fill all approved positions, may fill positions with H-2A workers transferred from other employers, reduce the number of workers requested because of a lack of housing, or withdraw

emergency applications. For example, in 1996 ETA certified 17,537 H-2A job openings, while 15,235 H-2A workers, or 87 percent of those workers, entered the United States. Figure IV.1 shows the geographic distribution of applications and workers certified in fiscal year 1996. Table IV.2 shows applications and workers requested and certified, by region, fiscal years 1994 through 1997.

Appendix IV
Characteristics of H-2A Participants

Figure IV.1: Distribution of Applications and Workers Certified, by Region, Fiscal Year 1996



Note: Region I (Boston) includes Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. Region II (New York) includes New Jersey, New York, Puerto Rico, and the Virgin Islands. Region III (Philadelphia) includes Delaware, the District of Columbia, Maryland, Pennsylvania, Virginia, and West Virginia. Region IV (Atlanta) includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. Region V (Chicago) includes Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin. Region VI (Dallas) includes Arkansas, Louisiana, New Mexico, Oklahoma, and Texas. Region VII (Kansas City) includes Iowa, Kansas, Missouri, and Nebraska. Region VIII (Denver) includes Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Region IX (San Francisco) includes Arizona, California, Hawaii, Nevada, and Guam. Region X (Seattle) includes Alaska, Idaho, Oregon, and Washington.

Appendix IV
Characteristics of H-2A Participants

Table IV.2: Number and Result of Applications for H-2A Certifications, by Region, Fiscal Year 1994-97

	1994	1995	1996	1997 ^a
Region I (Boston)				
Applications	363	361	389	245
Workers requested	2,556	3,364	3,446	3,115
Workers certified	2,518	2,963	3,129	2,970
Region II (New York)				
Applications	143	0	162	101
Workers requested	2,324	0	2,438	888
Workers certified	2,318	0	2,415	888
Region III (Philadelphia)				
Applications	24	25	23	14
Workers requested	1,721	2,999	3,150	3,101
Workers certified	1,690	2,994	3,134	3,069
Region IV (Atlanta)				
Applications	118	158	275	454
Workers requested	4,507	4,728	7,200	10,383
Workers certified	2,352	4,531	5,362	8,585
Region V (Chicago)				
Applications	1	0	4	7
Workers requested	200	0	368	400
Workers certified	200	0	368	334
Region VI (Dallas)				
Applications	73	73	98	103
Workers requested	523	490	828	889
Workers certified	523	486	827	889
Region VII (Kansas City)				
Applications	10	21	14	18
Workers requested	51	157	128	182
Workers certified	51	157	128	138
Region VIII (Denver)				
Applications	383	373	201	300
Workers requested	928	902	769	1,212
Workers certified	905	898	752	1,208
Region IX (San Francisco)				
Applications	485	471	397	339
Workers requested	1,058	1,184	936	827
Workers certified	998	1,142	934	819
Region X (Seattle)				
Applications	167	291	254	291

(continued)

Appendix IV
Characteristics of H-2A Participants

	1994	1995	1996	1997 ^a
Workers requested	713	631	589	700
Workers certified	618	538	508	600
Total				
Applications	1,767	1,773	1,817	1,872
Workers requested	14,581	14,455	19,852	21,697
Workers certified	12,173	13,709	17,557	19,500

Note: The number of orders (applications) does not equal the number of employers and the number of workers requested does not equal the exact number of H-2A workers employed. However, the data provide a general picture of where employers are located and where workers are going.

^aApplications for fiscal year 1997 include only those filed through June 30, 1997 (the first 9 months of the fiscal year), with the exception of region X, which includes applications through August 27, 1997.

Although national data are not available on the gender and age of H-2A workers, agency officials and employers report that there are few, if any, female H-2A workers. Also, H-2A workers are unaccompanied because the State Department consulates usually do not issue visas to family members because of concern that the worker will have less incentive to return home. This differs from the characteristics of domestic workers, where one in every five is female, according to NAWS estimates and nearly half of all domestic farmworkers live in living situations that include family members. Moreover, it is illegal to refuse to hire a domestic farmworker because he or she has a family, and H-2A requires that H-2A employers provide housing for families of domestic farmworkers when it is the prevailing practice in the area.

Data on the ages of H-2A workers are unavailable. However, an analysis of data from a major employer of H-2A workers shows that a majority of its 4,500 H-2A workers in fiscal year 1996 were younger than 33 years. This is similar to the age distribution of domestic farmworkers, as estimated by NAWS. (See fig. IV.2.)

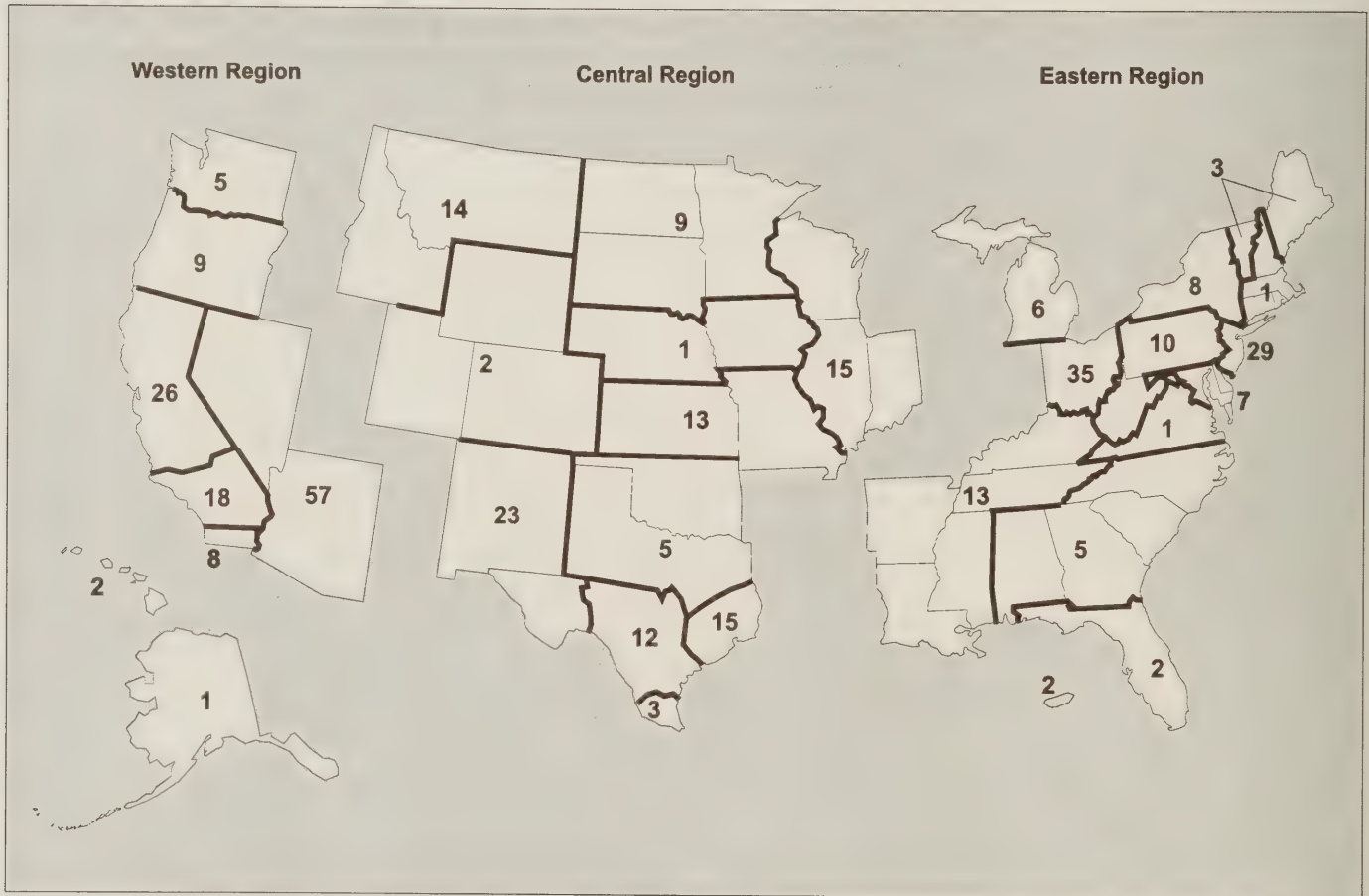
Figure IV.2: Comparison of Age Distribution of Domestic Workers With H-2A Workers at a Major H-2A Employer, Fiscal Year 1996



INS Worksite Enforcement Activities, Fiscal Year 1996

Figure V.1 shows the distribution of worksite enforcement cases involving agriculture-related employers identified as closed in INS' database of employer sanctions (worksite enforcement) cases, by region and by district. These are based on the report generated on every completed employer sanctions case, including both lead-driven investigations and randomly selected compliance inspections.

Figure V.1: INS Worksite Enforcement Activities Completed at Agriculture-Related Employers, October 1996-July 1997



Notes: Agriculture-related employers in this figure are those whose Standard Industrial Code begins with 01 (Agricultural Production), 02 (Agricultural Production—Livestock), or 07 (Agricultural Services).

Figure does not include all cases completed during this time period. According to INS, there is a 2- to 3-month lag between when cases are completed and the reports are submitted and keyed into the Investigations database. This includes all cases in the database as of July 17, 1997. Figure also does not include the 39 cases closed by Border Patrol personnel.

The Office of Field Operations oversees three regional offices that direct the activities of 33 districts and 21 Border Patrol sectors throughout the United States. The district offices are listed in table V.1.

Appendix V
INS Worksite Enforcement Activities, Fiscal
Year 1996

Table V.1: INS District Offices, by
Region

Office	Number of closed cases
Western Region: Laguna Niguel, Calif.	
Anchorage, Alaska	1
Honolulu, Hawaii	2
Los Angeles, Calif.	18
Phoenix, Ariz.	57
Portland, Oreg.	9
San Diego, Calif.	8
San Francisco, Calif.	26
Seattle, Wash.	5
Central Region: Dallas, Tex.	
Bloomington, Minn.	9
Chicago, Ill.	15
Dallas, Tex.	5
Denver, Colo.	2
El Paso, Tex.	23
Harlingen, Tex.	3
Helena, Mont.	14
Houston, Tex.	15
Kansas City, Mo.	13
Omaha, Neb.	1
San Antonio, Tex.	12
Eastern Region: South Burlington, Vt.	
Arlington, Va.	1
Atlanta, Ga.	5
Baltimore, Md.	7
Boston, Mass.	1
Buffalo, N.Y.	8
Cleveland, Oh.	35
Detroit, Mich.	6
Miami, Fla.	2
Newark, N.J.	0
New Orleans, La.	13
New York, N.Y.	29
Philadelphia, Pa.	10
Portland, Me.	3
San Juan, P.R.	2

Stakeholder Perspectives on Worker Protection Requirements Under H-2A Program

Issue	Requirement	Stakeholder perspectives	GAO comments
50-percent rule	Employers must hire any qualified domestic worker who applies for a job until 50 percent of the contract period has elapsed.	<p>Protects domestic workers from job displacement by foreign workers.</p> <p>Some stated that it is overly burdensome to hire domestic workers after H-2A certification is approved and the date of need has been reached.</p>	<p>SESAs reported that they did not send workers to H-2A employers after the beginning of the contract period. State and federal Labor officials stated that even when domestic workers are hired, enough work is available such that few, if any, H-2A workers are returned home as a result of the provision.</p>
Adverse effect wage rate (AEWR)	An employer must pay the same minimum wage or rate of pay to U.S. workers and H-2A workers. The rate, set by Labor, must also be at least as high as the applicable AEWR, the minimum wage, or the prevailing wage rate, whichever is highest.	<p>The AEWR may help to protect the wages and employment opportunities of domestic farmworkers.</p> <p>Some say that the AEWR rate calculations inappropriately result in wage rates that are too high. Others charge that the resulting wage rates are too low to sufficiently protect domestic workers and that AEWR acts as a "glass ceiling" for agricultural wages.</p>	<p>We did not assess the AEWR to determine its effectiveness in protecting the wages and employment of domestic farmworkers.</p> <p>H-2A employers continue to participate—and most have done so for many years—despite paying AEWR rates to foreign or domestic workers.</p> <p>H-2A employers are not required to pay Social Security taxes or Unemployment Insurance taxes for foreign workers, somewhat mitigating the potentially higher AEWR rate.</p>
Housing	Employers must provide housing that is certified as meeting minimum health and safety standards, free of charge to all H-2A workers .	<p>Ensures workers a safe and healthy workplace and reduces burden on community.</p> <p>Some employers expressed concerns about the difficulty in obtaining permission to construct permanent housing and about overly restrictive housing standards. Multiple levels of government involvement result in conflicting and redundant housing inspections.</p> <p>Some workers expressed concerns about inadequacy of standards, such as absence of a requirement to provide door locks on the building.</p>	<p>See ch. 3.</p> <p>Redundant oversight can needlessly create a regulatory burden on employers. Providing temporary housing could reduce the cost and regulatory burden of this provision on employers.</p>

(continued)

**Appendix VI
Stakeholder Perspectives on Worker
Protection Requirements Under H-2A
Program**

Issue	Requirement	Stakeholder perspectives	GAO comments
Transportation	Employers must (1) reimburse workers for the cost of transportation and subsistence from the place of recruitment to the place of work after workers have completed 50 percent of the work contract period, (2) provide free transportation between any required housing site and the worksite, and (3) pay for workers' transportation home or to the next job site upon completion of the work contract.	Provides incentives for the worker to remain with the employer. It can also provide incentives and opportunity for monitoring worker's return to country of origin. Worker advocates expressed concern about workers not being adequately reimbursed as a result of disagreements over the appropriate point of departure and destination and the mode of transportation.	As discussed in chap. 3, compliance with this requirement is difficult to monitor and enforce. In addition, reimbursement for transportation home requires the worker to complete the contract. This may be affected by the availability of work toward the end of the contract period.
Positive recruitment	Employers must actively try to recruit U.S. workers, including advertising in newspapers and on the radio, in areas of expected labor supply. Efforts must be equivalent to efforts of non-H-2A employers.	See ch. 3.	Labor OIG report on this matter is to be issued in spring 1998. See ch. 3.
Three-quarter guarantee	Employers must offer each worker employment for at least three-fourths of the workdays in the work contract period, including any extensions.	See ch. 3.	See ch. 3.
Appeals	See app. VII.	Because almost all certifications, visa petitions, and visas are approved, the appeal procedures are largely unused.	Because almost all certifications, visa petitions, and visas are approved, the appeal procedures are largely unused.

Appeal Rights During the H-2A Process

Point of appeal	Appeal rights
ETA rejects H-2A application for second time.	An employer can send a request, along with a copy to ETA, for an expedited administrative review to the Chief Administrative Law Judge within 7 days of ETA's rejection notice. ETA must then send a copy of the case file to the judge. The judge must act on the employer's request within 5 days of receiving the case file.
ETA denies labor certification at least 20 days before date of need.	An employer has the same rights as when an application is rejected.
INS denies petition requesting workers.	Only the employer has appeal rights; no such rights exist for H-2A workers.
Department of State consular officer denies worker's request for visa.	An alien may appeal a visa denial under limited circumstances. Appeals are made to the chief consular officer who may reverse, uphold, or refer the decision to the Department for an advisory opinion, which is binding only to the extent it involves a legal interpretation.
INS denies worker entry into the United States at the border.	After an alien is initially refused permission to enter the United States, the case is referred to an immigration judge for a hearing. If dissatisfied with the judge's decision, the alien can appeal to the Board of Immigration Appeals. If unsatisfied with the Board's ruling, the alien can ask the Board to reopen or reconsider the case, but such a decision is within the sole discretion of the Board.

Comments From the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employment Standards
Washington, D.C. 20210



DEC - 8 1997

The Honorable Carlotta C. Joyner
Director, Education and Employment Issues
United States General Accounting Office
Health, Education, and Human Services Division
Washington, D.C. 20548

Dear Ms. Joyner:

Thank you for the opportunity to comment on your draft report, "**H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers**" (GAO/HEHS-98-20, Code 205338). The Department of Labor generally agrees with the findings and recommendations in the draft report, and we compliment you and your staff on the thoroughness of your review. In addition to the following, we offer the enclosed technical comments and suggested corrections which we hope you will also consider in preparing your final report.

The Department agrees with the GAO's finding that a farm labor shortage does not now exist and is unlikely to exist in the foreseeable future. This finding is consistent with the conclusion of the Congressionally-mandated, bipartisan Commission on Agricultural Workers, as well as nearly all academic research on the issue.¹ In addition to the several lines of convincing evidence which the GAO followed in reaching this conclusion, still others lead to and confirm the same conclusion.

For example, the draft report states that "*BLS does not construct unemployment rates for the agriculture industry for counties or all states, or for occupations such as agricultural field worker, so this connection [of high unemployment rates to labor surpluses] cannot be verified directly*" (p. 25). It is the Department's view that the National Agricultural Worker Survey (NAWS), cited elsewhere in the draft report, does provide such a connection. The NAWS shows that, even in peak harvest months, there is a more than adequate supply of legal, work-authorized farm workers to meet agricultural labor needs.

¹ See, for example: Philip Martin, Wallace Huffman, Robert Emerson, J. Edward Taylor, and Refugio Rochin, Eds., 1995, Immigration Reform and U.S. Agriculture, Berkeley, CA, Division of Agriculture and Natural Resources Publication 3358; J. Edward Taylor, Philip Martin, and Michael Fix, 1997, Poverty Amid Prosperity: Immigration and the Changing Face of Rural California, Washington, D.C., Urban Institute Press; Binational Study, 1997, Migration between Mexico and the United States, Washington, D.C., Commission on Immigration Reform.

Working for America's Workforce

Now on p. 25.

Now on p. 25.

The draft report also states that “rising hourly wage rates may not always signify a labor shortage if, for example, workers are paid by piece rate, as is fairly common in the production of fruits, vegetables and horticulture” (p. 25). The Department concurs that the agricultural sector’s use of both piece and hourly rates makes it more difficult to infer the adequacy of labor supply from trends in hourly wage data alone. However, it is important to recognize that for several years both types of agricultural wage rates – hourly wages and piece rates – have been falling, consistent with the existence of labor surplus.

Now on p. 28.

The draft report acknowledges the depression of hourly wages when it states, “declining or flat real wages were occurring as total employment in agriculture was falling by 10 percent, which ... suggests the presence of farm labor surpluses rather than shortages” (p. 29). Yet, the above-cited quote (from p. 25) seems to suggest that piece rates could have an offsetting effect. As the draft report shows elsewhere, however, in reality the trends in piece rates appear to be exacerbating the overall downward trend. Both the NAWS and the NASS data show that real piece rate wages have fallen even more steeply than field workers’ hourly wages (Appendix III, Tables III.3 and III.4). This is significant, inasmuch as the NAWS data indicate that about one-quarter of all “field workers, who work primarily in fruit and vegetables, received a piece rate...for at least part of their earnings “ (fn 18, p.25).

Now footnote 19.

Another possible line of evidence confirming agricultural labor surpluses now and into the future relates to the draft report’s recognition that “implementation of the work requirements of the recent welfare reform legislation could serve as a potential source of [additional] labor for agricultural employers in some areas of the country” (p. 30). The report goes on to note, however, that “Some employers we interviewed ... think it unlikely that many former welfare recipients will have the ability to be suitable farmworkers, particularly single mothers with young children requiring daycare. Transportation from urban population centers to rural work sites was also cited as an impediment.” Setting aside the apparent gender discrimination underlying the first contention, it must be remembered that, historically, women – including many with young children requiring daycare – have and do participate in the agricultural labor force both as migrant and local, seasonal farm workers. There is nothing unique about agriculture and the problems former welfare recipients will confront as they seek employment. Former welfare recipients and their employers must develop solutions to the difficulties they will inevitably confront with child care arrangements; this will be true if the former recipients seek employment in hotels, restaurants, agriculture, or any other industry.

Now on pp. 29 and 30.

Further, the implication that welfare recipients who must now fill mandated work requirements are exclusively located in distant urban centers entirely ignores the large welfare population located in the Nation’s rural, agricultural areas. This substantial population of rural unemployed and welfare recipients in rural California was recently documented in *Poverty Amid Prosperity: Immigration and the Changing Face of Rural California*. We suggest that the final report would benefit by including data on the

welfare population – and the portion of this population that must meet mandated work requirements in the next few years – who reside in the 20 large agricultural counties that GAO analyzed for other purposes in the draft report. We will attempt to obtain this information from HHS to help demonstrate that welfare reform is not irrelevant to projections of the agricultural workforce.

Now on p. 30.

The Department also concurs with the draft report's assessment that INS enforcement is unlikely to "*significantly reduce the availability of agricultural labor, either nationally or regionally*" (p. 31). This Administration is deeply committed to stemming illegal immigration to the U.S., and has taken unprecedented and comprehensive steps to achieve this goal. The threat of – and oft-repeated anecdotes about – disruption of the agricultural labor force by INS raids on farms during the planting or harvest season, resulting in the apprehension and deportation of the workforce and devastating financial loss to the employer, are uniformly cited by proponents as justification for legalizing the currently illegal flow of immigrants to work in U.S. agriculture, by substantial weakening the labor protections in the H-2A program or its replacement by a much inferior foreign farmworker program. The draft report indicates that in 1996 "*fewer than 700 workers ... were arrested during INS' enforcement operations at ... agricultural worksites*" (p. 33-34), including landscaping and lawn maintenance firms, among others – "*fewer than 700 workers*" out of an agricultural workforce of at least 1.5 million. Nonetheless, even if INS agricultural enforcement could easily overcome the very substantial obstacles – both legislative and logistical – it faces and thereby significantly impact the supply of illegal immigrants in the farm labor workforce in the short-term, NAWS data indicate (as noted above) that there is an adequate supply of legal, authorized farm labor in the U.S.

Now on p. 32.

Farmworkers in this country experience very low wages, receive few if any employment benefits, and suffer from chronic high levels of unemployment and systemic underemployment. The real challenge in meeting agricultural labor needs and improving the well-being of farmworkers is not to legalize the flow of migrant labor from other countries into the U.S. agricultural sector, but to substantially improve job matching services between growers and legal, domestic farmworkers and to find ways to more frequently and predictably link short-term agricultural employment opportunities to better utilize the existing farm labor workforce, attack underemployment and raise farmworkers' annual earnings. As the draft report indicates, the U.S. Employment Service is underutilized by agriculture (see f/n 15, p. 24). The expansion of America's Job Bank to include agricultural job opportunities and farmworkers is but one measure that can and should be taken to meet these critical challenges. The Department recently acted to ensure that America's Job Bank includes all H-2A job orders. The Department is also seeking ways to improve recruitment and dissemination of all agricultural job orders through the employment service, including the use of law-abiding farm labor contractors.

Now footnote 16.

The Department generally agrees as well with the draft report's findings and recommendations, as discussed further below, regarding improvements to the H-2A

program to better meet the needs of agricultural employers and better protect farmworkers. While the enclosed comments address and/or correct some of the findings reported, we will address each of the draft report's recommendations in turn.

Recommendation

"To simplify the H-2A application process and reduce the cost and burden on agricultural employers, we recommend that the Attorney General delegate authority for approval of H-2A visa petitions from the INS to the Secretary of Labor or his or her designee and revise corresponding regulations as necessary to implement and facilitate such an agreement including a revision of visa extension and appeals procedures."

DOL Comments

While the Department of Labor defers to the Attorney General regarding this recommendation, the Department concurs that this would allow reducing the lead time for H-2A applications and, thus, would also concur with a decision by the Attorney General to implement this recommendation. The Department notes, however, that such delegation would require the Department to assume responsibility for additional workloads. Therefore, GAO should recognize – and, perhaps, modify this recommendation accordingly – that additional resources will be needed by the Department to carry out this function, including the authority to assess, collect, and retain user fees from applicants – like those currently paid for INS petition processing services – to cover all of the costs of the H-2A application/petition processing workload.

Recommendation

"If ... [and] after the Attorney General has delegated INS's role in petition approval to Labor, to reduce total application processing time and facilitate better accuracy in estimating the date workers will be needed, we recommend that the Secretary of Labor amend the regulations to allow H-2A applications to be submitted up to 45, rather than 60 days before the date of need so long as INS does not have a role in the petition approval process."

DOL Comments

If the Attorney General were to fully delegate H-2A visa petition adjudication authority to the Secretary of Labor, the Department concurs with this recommendation to reduce the lead time for H-2A application (from 60) to 45 days before the date of need. The Department would endeavor to propose regulations to implement this change simultaneously with any such delegation by the Attorney General.

Recommendation

"If the Attorney General delegates this [petition approval] authority [to Labor] ... to protect work opportunities for domestic workers by ensuring that sufficient time is available for agricultural employers to positively recruit domestic workers while reducing the total processing time, we recommend that Congress amend the Immigration and Nationality Act so that, as long as the authority for approval of H-2A visa petitions remain with Labor, Labor would be required to complete all applications at least 7 days before the date of need, rather than 20 days."

DOL Comments

While this is a recommendation for action by the Congress, if the Attorney General were to fully delegate H-2A visa petition adjudication authority to the Secretary of Labor, the Department of Labor would endorse the recommended legislative change.

Recommendation

"To better protect both domestic and H-2A workers, we recommend that the Secretary of Labor transfer the authority to suspend employers with serious labor standards or H-2A contract violations from the Employment and Training Administration to the Wage and Hour Division of the Employment Standards Administration."

DOL Comments

The Department concurs with this recommendation, but suggests that the language of the recommendation be changed to, "To better protect both domestic and H-2A workers, we recommend that the Secretary of Labor extend the authority to suspend employers with serious labor standards or H-2A contract violations to the Wage and Hour Division of the Employment Standards Administration."

Recommendation

"To better protect both domestic and H-2A workers, we recommend that the Secretary of Labor revise its regulations to require agricultural employers to guarantee H-2A workers wages for the first week after the date of need and to pay workers those wages no later than seven days after the date of need."

DOL Comments

While the enclosed technical comments explain the reason for the current different treatment of H-2A workers and workers referred for agricultural employment through the Interstate Clearance System, the Department concurs with this recommendation to be proposed through notice-and-comment rulemaking.

Recommendation

"To better protect both domestic and H-2A workers, we recommend that the Secretary of Labor revise regulations to apply the three quarters guarantee incrementally during the duration of the H-2A contract in a manner which would improve the protection afforded to H-2A workers but also minimizes any additional administrative burdens on agricultural employers."

DOL Comments

The "three quarter guarantee" is intended to serve two purposes:

- assure that farmworkers – both domestic and foreign – who are recruited and often travel from distant locations for agricultural employment in the U.S. do not actually end up earning substantially (*i.e.*, more than 25 percent) less than they were led to believe they would earn through the initial employment offer; and,
- encourage H-2A employer-applicants to accurately estimate both their labor force needs and the duration of employment they can offer so as to limit their potential wage liabilities.

The Department believes that the three quarter guarantee serves these purposes and, consequently, most often tends to encourage employer-applicants to underestimate – rather than overestimate – the duration of employment (the contract period), particularly in light of the relative ease of obtaining extensions of the contract period, and related labor certification, if it should prove necessary. Nonetheless, the Department understands that some employers may not perceive the three quarter guarantee in this way and – like the example cited in the draft report (p. 63) – overestimate the contract period in the expectation that less work and lower earnings towards the end of the contract period will encourage workers to "abandon" employment and, thereby, relieve the employer of its three quarter guarantee and return transportation reimbursement obligations.

The Department concurs that it is important that the three quarter guarantee operate as it was intended, and not abused to frustrate its purpose. However, because agriculture is often characterized by some fluctuations in the amount of work required during a growing season, the particular approach recommended – incremental application of the three quarter guarantee – may not be the most appropriate solution to the problem identified. Therefore, the Department will evaluate other possible approaches to solving the basic problem the GAO has identified and, if appropriate, propose solutions through notice-and-comment rulemaking, or implement administrative solutions that do not require rulemaking. In this context, the Department is not now prepared to concur with this specific recommendation.

Now on p. 61.

Recommendation

"To improve service to both employers and workers, we also recommend that the Secretary of Labor regularly collect data on its performance in meeting H-2A regulatory and statutory deadlines for processing H-2A applications, and use these data to monitor and improve its performance."

DOL Comments

The Department concurs with this recommendation. It should be noted, however, that in the last few years the Congress has reduced the appropriation for the U.S. Employment Service's Foreign Labor Certification Program, which administers the H-2A application process, among others, by \$19.6 million – or nearly 40 percent – from the funding levels requested by the President for this function. Overcoming the limited data collection capacity reflected in the draft report will require additional resources that may not be available.

Recommendation

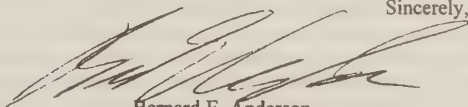
"To improve service to both employers and workers, we also recommend that the Secretary of Labor update and revise the H-2A handbook to include the procedures for all agencies involved and key contact points, both in Labor and other agencies."

DOL Comments

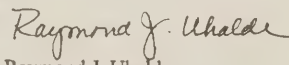
The Department – while noting that H-2A compliance materials for program users are accurate and up-to-date – concurs with this recommendation. We would point out, however, that revision of the H-2A handbook should coincide with resolution and implementation of the preceding recommendations which would directly affect the content of such revision in several respects.

Again, we appreciate the opportunity to review and comment on this draft report. If we can be of any further assistance or clarify these and/or the enclosed comments, please do not hesitate to contact Ms. Cindy McCord, Office of the Chief Financial Officer, at 219-7700.

Sincerely,



Bernard E. Anderson
Assistant Secretary for
Employment Standards



Raymond J. Uhalde
Acting Assistant Secretary for
Employment and Training

Enclosure

Comments From the Department of State



United States Department of State

Chief Financial Officer

Washington, D.C. 20520-7427

December 2, 1997

Dear Mr. Hembra:

We appreciate the opportunity to review your draft report: "H-2A AGRICULTURAL GUESTWORKER PROGRAM: Changes Could Improve Services to Employers and Better Protect Workers," GAO/HEHS-98-20, GAO Job Code 205338.

The Department finds that the report represents an accurate account of the H2A Agricultural Guestworker Program.

If you have any questions concerning this response, please contact Mr. Dennis Merz, CA/VO at (202) 663-1186.

Sincerely,

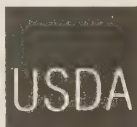

Richard L. Greene

cc:

GAO/HEHS - Mr. Jeszeck/Ms. Schwartz
STATE/CA/VO - Mr. Merz

Mr. Richard L. Hembra,
Assistant Comptroller General,
Health, Education, and Human Services,
U.S. General Accounting Office.

Comments From the U.S. Department of Agriculture



**United States
Department of
Agriculture**

Office of Secretary

Office of the Chief Economist

14th & Independence Ave., SW
Washington, DC 20250

December 4, 1997

Ms. Carlotta C. Joyner
Director, Education and Employment Issues
Health, Education, and Human Resources Division
United States General Accounting Office
Washington, DC 20548

Dear Ms. Joyner:

This is in reply to your letter to Secretary Dan Glickman requesting comments on the draft General Accounting Office report entitled "H-2A Agricultural Guestworker Program: Changes Could Improve Services to Employers and Better Protect Workers." The Department of Agriculture's (USDA) response is enclosed.

USDA appreciates this opportunity to comment on this report.

Sincerely,

A handwritten signature in dark ink, appearing to read "Keith J. Collins", is written over a light-colored background.

Keith J. Collins
Chief Economist

Enclosure

U.S. Department of Agriculture's Response to the Draft
Report of the General Accounting Office entitled
"H-2A Agricultural Guestworker Program:
Changes Could Improve Services to Employers and Better Protect Workers."

These comments list GAO report statements, conclusions, or recommendations that the Department of Agriculture (USDA) believes are inaccurate or need clarification. These are listed in chronological order as "findings," "conclusions," or "recommendations" followed by USDA's response.

Finding:

A widespread labor shortage does not currently appear to exist and is unlikely in the near future. Although there is widespread agreement that a significant portion of the farm labor force is not legally authorized to work, [Immigration and Naturalization Service (INS)] INS enforcement activity is unlikely to generate significant farm labor shortages.

By GAO's estimate, there are 600,000 illegal aliens in the agricultural workforce.

Response:

USDA believes the significant question to be resolved, and that which was directed by the Congress, is whether an adequate supply of *qualified United States* workers is available at the time and place needed.

USDA believes that dependence on illegal aliens would be poor policy that would ill serve both agricultural employers and workers. In addition, such dependence would be contrary to congressional intent when they enacted the H-2A temporary agricultural worker program for the dual purpose of assuring farmers a dependable supply of qualified workers and protecting the wages and working conditions of U.S. workers. The H-2A program gives preferential hiring treatment to U.S. workers for farm jobs with enhanced compensation and benefits. Illegal aliens displace workers from jobs and may bid down wages and benefits. Clearly, the employment of legal workers under controlled conditions that protect U.S. workers is preferable to the employment of illegal aliens.

Finding:

Ample Supplies of Farm Labor Appear to be Available in Most Areas (based on an analysis of unemployment rates)

Response:

USDA questions GAO's analysis of unemployment rates to assess the availability of workers. Such analysis fails to recognize that farm work is seasonal, conducted in diverse areas at different times, agricultural employment levels fluctuate, and that farm workers are selective in the jobs they desire. The fact that there are high levels of unemployment in a seasonal industry is not evidence of a surplus of workers but a function of arithmetic; if there are a sufficient number of workers to meet peak labor demands, there will necessarily be unemployment in the off seasons.

According to the most recent Agricultural Work Force Survey by the Bureau of the Census, workers spent an average of 112 days doing farm work in 1987. Thirty-five percent of the workers were casual workers, working fewer than 25 days during the year. Most casual workers are students or housewives who do not seek employment during most of the year. Unemployment rates do not indicate whether workers are willing to accept particular jobs at the time and place needed.

GAO concluded from a case study of H-2A recruitment that "individuals decide to offer their services after weighing a specific job opportunity and the alternatives against personal attitudes about work, leisure, and valuations of the different elements of the situation" and "[s]ome U.S. workers bitterly complain of the foreign workers who take their jobs, but at the same time, most acknowledge that they are unwilling to do those jobs and that their children are moving away from farm work." GAO also concluded that "even with a more rigorous labor supply test in the season we observed, neither the growers or the Virginia state employment service could have located enough U.S. workers to fill the jobs offered."¹

Finding:

INS Enforcement Efforts Are Unlikely To Significantly Reduce The Number of Unauthorized Farmworkers

Fewer than 5 percent of the 4,600 [INS] investigations completed in fiscal year 1996 involved employers in agricultural production or services.

Response:

USDA agrees that, absent an effective method to identify fraudulent documents, INS worksite enforcement efforts are unlikely to significantly reduce the number of unauthorized farm workers. However, INS's efforts have certainly reduced the work force of individual farmers with devastating results. The fact that INS did not assess penalties against many of these farmers

¹ U.S. General Accounting Office, The H-2A Program: Protections for U.S. Farmworkers (GAO/PEMD-89-3, October 21, 1988).

indicates that the farmers had properly conducted the INS I-9 eligibility verification process and were not knowingly hiring illegal aliens. INS estimates that most illegal alien workers possess fraudulent documents.²

INS worksite enforcement efforts are just one of the efforts that affects farmers' labor supply. DOL is also engaged in worksite enforcement of immigration laws. And INS is reporting significant success in sealing off the border to as to prevent the entrance of illegal aliens.

Agricultural employers advise USDA that their primary disruption comes not from INS worksite enforcement but from INS's high profile local area activities. When INS focuses on an area conducting roadblocks, sweeps of shopping malls, laundromats, and other places they expect aliens to be found, the news of these actions spreads quickly and many aliens quit their jobs and flee the area. The result is a sudden, unforeseen shortage of labor in the area.

Finding:

Although Employers Obtain H-2A Workers, Applications Are Not Processed In A Timely Manner

Response:

This is the most frequent complaint USDA receives from farm employers about the H-2A program. The failure to meet program deadlines has resulted in crops not being planted, critical production work not being performed, and crops not harvested.

Finding:

Requirement to Request Workers 60 Days in Advance Is Problematic

This difficulty [in estimating the date of need] may help explain why many employers were late filing applications for certification with Labor; 42 percent of all applications in fiscal year 1996 were filed late.

Not only is it difficult for employers to precisely estimate their date of need 60 days in advance, recruitment efforts that far in advance are frequently of little interest to currently-employed workers. Recruitment near the date of need is much more effective.

Although GAO found 42 percent of employers' applications were filed late, USDA questions how many of these "late" applications were emergency applications due to unforeseen

² "Meeting the Challenge Through Innovation," Immigration and Naturalization Service; September, 1996; page 23.

circumstances and how many were tardy applications. The Department of Labor (DOL) rejects late-filed applications. Emergency applications are filed and processed in accordance with the H-2A regulations and it is inappropriate to characterize them as "late." The H-2A program Handbook (page I-53) provides:

4. Rejection - Untimely Applications

Applications for H-2A certification which are received by the [Regional Administrator] less than 60 days before the employer's first date of need must be rejected for lack of timeliness, unless the employer meets the guidelines for . . . emergency processing contained in the regulations at . . . 20 CFR 655.101(f).

Finding:

The Department of Justice authorizes the State Department to issue non-immigrant visas for H-2A workers *only* after the Department of Labor certifies that a labor shortage exists and that the wages and working conditions of U.S. workers similarly employed will not be adversely affected by the importation of guestworkers. [Emphasis added].

Response:

The Immigration and Nationality Act (INA) states:

Sec. 218 [8 U.S.C. 1188] (a) CONDITIONS FOR THE APPROVAL OF H-2A PETITIONS.—(1) A petition to import an alien as an H-2A worker may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that . . .

Department of Justice's H-2A regulation at 8 CFR Part 214 states:

The statute does not specifically require that a certification be obtained before a petition can be filed, only that it be applied for. This indicates that Congress intended to leave some room for INS to grant H-2A status even though a certification is denied. [52 Fed. Reg. 104 @ 20554 (June 1, 1987)].

Finding:

The Department of Agriculture conducts surveys and acts in an advisory role to the Department of Labor in Labor's determination of the minimum wage rates to be paid by employers of H-2A workers . . .

Response:

The Department of Agriculture (USDA) has consulted with DOL and INS on a wide variety of issues related to the H-2A program including regulatory issues, consideration of administrative reforms, enforcement, DOL prevailing rate survey methodology, existence of labor shortage emergencies, and legislative proposals in addition to conducting the wage surveys upon which the adverse effect wage rate (one of the wage rate minima to be paid by employers of H-2A workers) is based.

Finding:

For example, in March 1996, the House rejected legislation that would have moved the H-2A program from Labor to the Justice Department . . .

Response:

The H-2A program is currently administered by the Justice Department in consultation with DOL and USDA. The INA states:

Sec. 214 [8 U.S.C. 1184] (c)(1) The question of importing any alien as a non-immigrant under section 101(a)(15)(H), (L), or (P)(I) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government upon petition of the importing employer. . . . For purposes of this subsection with respect to nonimmigrants described in section 101(a)(15)(H)(ii)(a), the term "appropriate agencies of Government" means the Department of Labor and includes the Department of Agriculture.

Finding:

. . . total employment in agriculture was falling by 10 percent between 1987 and 1996 (table III.4. app III), (sic) which also suggests the presence of farm labor surpluses rather than shortages.

Response:

Total employment in agriculture was falling by 6 percent during the 1986-1997 period rather than 10 percent or the 15.9 percent indicated in the referenced table. GAO includes a footnote that advises this trend should be interpreted with caution because it does not include agricultural employment obtained through farm labor contractors and there is considerable turnover in farm labor markets. USDA agrees. We believe that an analysis of total employment in agriculture should be based on the total agricultural workforce, not simply directly hired

Appendix X
Comments From the U.S. Department of
Agriculture

workers because the proportion of workers employed by farm labor contractors increased 28 percent during this period. We are submitting a revised table indicating total farm employment.

Findings:

[As evidence of the adequacy of the supply of agricultural labor, one expert also noted that growers appear to continue to be investing in new farm production that will not bring returns for a number of years, suggesting a long term confidence that agricultural labor would be available.

Response:

The reason new farm investment is increasing is the rational assumption that the population will continue to increase, this population will increasingly require affordable, safe, and nutritious food, and that the program that Congress enacted 50 years ago to assure the agricultural industry an adequate and affordable labor supply (or that program's successor) will meet agricultural employers' needs in order to meet consumer demand. It appears that we are already engaged in a process to determine whether and how agricultural labor needs will be met in the future.

Findings:

NAWS data for 1995 show that, on a monthly basis, over 40 percent of all crop workers were not employed in agriculture over the entire year, even during peak periods.

Response:

Although the data show considerable underemployment for agricultural workers, it is difficult to associate this fact with the adequacy of the agricultural labor supply because agriculture is seasonal and farm activity varies in different geographical areas at different times of the year. During the peak summer season, it is of little comfort to employers in the North to know that there are many unemployed winter fruit and vegetable workers in the South. In addition, according to the National Agricultural Statistics Service, farm employment in January, 1997 was 766,000 while the number of workers employed in July, 1997 was 1.41 million. The unpleasant fact is that, if there are sufficient workers available to meet peak agricultural labor needs, there will necessarily be widespread unemployment among agricultural workers during most of the year. A supplemental foreign labor program mitigates this effect.

Findings:

Law abiding employers, in particular, are unlikely to be targeted for enforcement efforts, given INS's focus on apprehending criminal aliens and identifying employers who have engaged in criminal acts. Current enforcement actions in agriculture are a small proportion of INS's total enforcement operations and result in few apprehensions.

Further, fewer than 700 workers, about 4 percent of all employees at these worksites, were arrested during INS enforcement operations at these agricultural worksites.

INS focuses primarily on employers in these industries who are "abusive"--that is, employers who are known to have intentionally hired illegal workers; to have been involved in criminal violations like alien smuggling and harboring; to be repeat offenders; or to have subjected their employees to unlawfully substandard working conditions, housing, or wages.

Response:

The immigration laws are enforced by both INS and DOL. Current worksite enforcement efforts may not target law-abiding-farmer employers but they do appear to include them. We believe this is the case because USDA has received numerous reports of farmers who have lost most of their work force without drawing penalties from INS. This indicates that these employers are properly conducting the employment verification procedures but have been victimized by the use of fraudulent documents. INS often determines, through procedures not available to employers, that 75 percent or more of an employer's work force submitted fraudulent documents. Such documents are readily available to illegal aliens at modest cost.

The fact there are few apprehensions is not a accurate measure of the disruption that occurs on farms. The illegal aliens found on farmer payrolls are seldom apprehended because, according to INS officials, INS lacks the resources to transport the workers to their native country. But the effect on employers can be devastating because they may be left with only a fraction of their work force. Although INS publicizes its efforts to minimize disruptions to business operations by filling job vacancies created by the removal of illegal aliens from the work force,³ USDA is unaware of a single instance where this has occurred in agriculture. However, INS enforcement officials sometimes advise agricultural employers they may replace barred unauthorized workers with H-2A workers.

INS's worksite enforcement is but one of several enforcement strategies that affect the supply of agricultural labor. In addition to INS worksite enforcement there are enforcement activities by DOL, border control activities, road checks, and local area sweeps. Employers tell

³ "Meeting the Challenge Through Innovation;" Immigration and Naturalization Service; September, 1996; page 23.

USDA that local area sweeps that cause workers to leave an area is the primary cause of the sudden, unforeseen labor shortages they experience. They also tell us that the H-2A program is too cumbersome to replace lost workers if this occurs at a critical time.

In one instance reported to USDA this summer, an experienced vegetable grower in Arkansas was confronted with an unforeseen labor shortage. The State employment service told him no workers were available. He filed an emergency H-2A application that was rejected ten days later because one item in the application was incomplete (he failed to note that although the workers would be paid a piece rate, the minimum hourly rate would be guaranteed) and another item was unclear (he had listed a hotel as an alternative housing resource should it be needed). By the time he was informed of the rejection, it was too late to refile the application and obtain the necessary workers. He estimates his loss at \$350,000 and says it is unclear whether he can continue his farm operation.

This summer, a vegetable grower in California reported that he lost most of his crew in the midst of harvest as a result of an INS road check. Among other efforts to locate replacement workers, he placed a job order for over 100 workers with the State employment service. The State employment service referred three workers, one of whom reported for work; the worker quit after three days. As a result, the farmer found it necessary to plow up 60 acres of vegetables.

Finding:

INS officers face certain judicial requirements which can also complicate enforcement efforts at agricultural workplaces. For example, current law requires INS officers to have either the employer's permission or a search warrant before entering a farm or other outdoor agricultural operation to interrogate a person about his or her right to be in the United States.

Response:

INS officers are required by law to have either the employer's permission or a search warrant before entering any work place to interrogate a person about his or her right to be in the United States. Protection against unreasonable search and seizure is not unique to agricultural employers.

Finding:

In 1991 President Bush issued Executive Order 12781 authorizing demonstration projects of an employment verification system. INS established the Employment Verification Pilot, a voluntary test program that allows employers to electronically verify the employment eligibility of newly hired noncitizen workers.

Response:

Employers are no longer being accepted into this program.

Finding:

INS told us that the program does little to assist employers because documents are verified by INS only if the individual worker identifies himself or herself as an alien.

Response:

Workers who claim to be U.S. citizens and possess fraudulent documents are liable to be detected by the Social Security Administration (SSA). SSA requires employers to verify through its Enumeration Verification System the names and social security numbers that do not agree with SSA records (if the Wage and Tax statements filed by the employer has an error rate that exceeds ten percent). Under the Internal Revenue Service Code, the Internal Revenue Service may charge employers a \$50 penalty each time an incorrect social security number is filed on a wage report. They may also charge the employee a \$50 penalty each time the employee does not furnish his or her correct social security number to the employer.

Finding:

Certain program requirements also do not appear to be accomplishing their intended purpose. For example, the requirement that agricultural employers actively recruit domestic workers before bringing in guestworkers is often inadequate to protect employment opportunities for U.S. workers.

Response:

This unsupported statement appears inconsistent with GAO's findings in a more rigorous case study that examined the question of the adequacy of H-2A positive recruitment. In 1987 GAO examined the recruitment efforts of growers, the employment service system, and GAO officials themselves attempted to recruit workers for H-2A jobs. The following are excerpts from that report:

When the job orders were filed, an official in the local office of the state employment service began the recruitment efforts required by DOL regulations. He placed help-wanted advertisements on local radio, put up posters at stores and schools announcing the job vacancies, and sent postcards about the vacancies to about 300 people listed in the office file of those interested in farm work.

However, this official reported that not one worker even showed interest as a result of these activities.

Employment service officials' efforts to recruit domestic workers throughout Virginia and in other states were also relatively unsuccessful. Four offices elsewhere in Virginia referred a total of 23 workers about the job orders. Virginia officials also notified the employment services in other states about the job orders. Five accepted them for processing--Texas, Florida, Louisiana, Delaware, and West Virginia. As far as we could learn, only one of these states referred any workers and of this small number we found no record that any were hired. Other states rejected the job orders, citing conflict with local labor demand or lack of local interest. The 1987 recruitment process eventually yielded a total of 33 U.S. workers referred to the growers, only a small fraction of the stated labor need.

For a full week in August, we searched for U.S. farmworkers in several counties in the tobacco growing area of southern Virginia, using most of the means suggested by the Department of Labor recruitment regulations. In several towns, local job training and employment service officials arranged for us to meet with current or past farmworkers. We searched extensively in communities in the case study region, armed with lists of potential workers, addresses of large housing projects, and contacts with knowledgeable community leaders, yet we could not find a significant pool of available workers. In that week's effort, we located a total of 25 U.S. workers, the majority of whom were either not interested in doing heavy field work or had little pertinent experience.

In summary, we concluded that there were shortcomings in the protection of U.S. workers in the recruitment process in the season we observed, especially when DOL accepted state officials explanations of why those referred were not hired, which were based exclusively on growers' statements. However, only 33 workers were referred. Thus, even if all had been hired for the full season, growers labor demands would not have been met. From our own observations in nearby areas, we also concluded that even with a more rigorous labor supply test in the season we observed, neither the growers or the Virginia state employment service could have located enough U.S. workers to fill the jobs offered. Especially considering that in addition to the requests for 240 tobacco workers from the association we examined closely, a nearby association requested about 600 more tobacco workers, and requested 100 cabbage workers as well, the total of about 1,000 farmworkers the growers requested for the 1987 season in southern Virginia clearly could not have been supplied from readily available U.S. labor sources.⁴

⁴ U.S. General Accounting Office; The H-2A Program: Protections for U.S. Farmworkers (GAO/PEMD-89-3, October 21, 1988).

This GAO study concluded that faulty recruitment was not a major cause of the lack of U.S. workers.

Finding:

Labor may waive the 60-day filing requirement in emergency situations if the employer can demonstrate that "good and substantial cause exists," such as unforeseen changes in market conditions or unexpected unavailability of previously identified domestic workers.

Response:

This statement may be interpreted to mean that an agricultural employer who experiences an unexpected labor shortage as a result of INS enforcement activity would not be eligible for an emergency certification when, in fact, they are.

Finding:

Because employers do not fill all of the job openings Labor certifies, the number of job openings is higher than the number of H-2A visas issued by the State department. For example, although 20,000 job openings were certified for fiscal year 1996, about 15,000 workers were actually employed.

Response:

Employers fill most of the job openings Labor certifies. The disparity between the number of certifications and the number of visas generally represents jobs filled by domestic workers subsequent to DOL's certification, or jobs filled by H-2A workers who transfer from other employers after completion of their original contracts. An employer must be H-2A certified in order to employ previously admitted H-2A workers and the workers must apply for an extension of their visas, but it is not necessary for the State Department to issue new visas.

Finding:

One cause of late certifications is employers' failure to file applications at least 60 days prior to the date of need, as required. For example, in fiscal year 1996, employers filed 1,769 applications with Labor. Of these, 737, or 42 percent, were filed with fewer than 60 days remaining to the date of need.

Response:

Since DOL rejects regular applications filed with less than 60 days to the date of need, or requires the employer to postpone its date of need, the 42 percent of "late filed" applications must represent emergency applications rather than a failure by employers to meet program requirements. The H-2A program Handbook (page I-53) provides:

4. Rejection - Untimely Applications

Applications for H-2A certification which are received by the [Regional Administrator] less than 60 days before the employer's first date of need must be rejected for lack of timeliness, unless the employer meets the guidelines for . . . emergency processing contained in the regulations at . . . 20 CFR 655.101(f).

Finding:

In fact, Labor missed the certification deadline for 40 percent of the 1,030 applications submitted at least 60 days prior to the date of need by agricultural employers. Reasons for missing the certification deadline include . . . (3) the application was filed on an emergency basis, which, if accepted, would waive the 60 day filing requirement.

Response:

Since the sole purpose of emergency applications is to seek waivers of the filing deadlines, this could not be a reason for the late certification of the 1,030 applications that were submitted prior to the 60-day deadline for regular applications.

Finding:

INS procedures require that visitors return the I-94 [immigration document] when they leave the country. . . . Because no INS employees are inspecting traffic exiting the country at land border crossings, there is no assurance that the I-94's are being submitted.

Response:

Because no INS employees are available at land border exit crossings, there is no one to whom H-2A workers (or visitors) may submit their I-94's. Frequently, H-2A workers submit their I-94's to Mexican immigration officials at the border in which case they may or may not be delivered to INS. Nevertheless, H-2A employers may be fined by INS \$200 per worker for those the employer cannot demonstrate have repatriated.

Finding:

Positive Recruitment Providing Few Jobs for Domestic Workers

The positive recruitment requirement appears to result in few job placements of domestic workers. . . . even though North Carolina employers asked for more than 5,000 workers, the Commission referred only 13 potential workers to H-2A employers. . . . While several H-2A employers told us that positive recruitment was a waste of time and money because no domestic workers were willing to accept the work, non-H-2A employers joined others in asking why one agricultural employer would be unable to find a single domestic worker, while a neighbor could find all they needed.

Response:

This section should read "The positive recruitment requirement appears to result in few job placements *through employment service referrals* of domestic workers." One of the H-2A employer associations in North Carolina advises USDA that in 1997, through their positive recruitment efforts outside of the employment service system, they recruited and employed 3,196 U.S. workers.

This association also conducted positive recruitment through the employment service system as far away as Florida. Data provided to USDA indicate that they received 87 referrals from the employment service.

Of the 87 referrals:

- 28 failed to report for their interview
- 1 refused the job
- 58 were hired

Of the 58 hired:

- 27 did not report to work
- 31 reported to work

Of the 31 who reported:

- 26 abandoned the job
- 1 was terminated for cause
- 4 completed the season

Finding:

Although current law requires that employers provide transportation and housing for workers recruited outside an area, they do not require that these be provided for locally recruited workers, even though the local recruitment may be hundreds of miles from the actual worksite.

Response:

There is no general law which requires that employers provide transportation and housing for workers recruited outside an area. There are housing and transportation requirements for workers recruited through the DOL interstate clearance system and for H-2A employers.

If a worker is recruited hundreds of miles from the actual worksite, an H-2A employer is required to provide free housing. The pertinent H-2A regulation at 20 CFR 655.102(b)(1) provides:

Housing. The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker, . . .

Similarly, a worker recruited hundreds of miles from the actual worksite is entitled to transportation benefits on the same basis as other H-2A workers. H-2A employers are required to pay inbound transportation and subsistence reimbursement to workers upon completion of 50 percent of the contract period and return costs if the worker completes the full contract period. If it is the prevailing practice in an area for non-H-2A employers to advance or provide transportation, then H-2A employers must do the same. See 20 CFR 655.102(b)(5).

Finding:

Of the 220 domestic workers who applied to one major H-2A in 1996, 70 percent refused employment or did not show up for work. This employer was an association which filed "master job orders" with ETA allowing it to place workers all over a large state. SESA officials in one state told us they had recently obtained commitments from associations to place domestically recruited workers at worksites close to their homes. However, it is unclear how such commitments will be monitored and enforced.

Response:

An association in North Carolina is the only association that fits the given description. The supervisor of Rural Manpower Services in North Carolina advises USDA that an understanding has existed since prior to his appointment in 1994 that workers would be placed as close as possible to their residences. He said that he monitors all such placements in North Carolina and would be aware if this policy were violated but indicated it has not.

Finding:

Under the H-2A program's three-quarter wage guarantee, an employer must offer each worker employment for at least three-fourths of the workdays in the work contract period and any extensions. . . . This provision is intended to ensure that employers make honest assessments of both the number of workers needed and the time they will be employed, and that prospective workers have some guarantee about the total wages and duration of employment to be accepted.

* * * * *

These enforcement difficulties also create an incentive for less scrupulous employers to request contract periods longer than necessary: if workers leave the worksite before the contract period ends, the employer is not obligated to pay the 3/4 guarantee or their transportation home.

Response:

It is implausible that an employer would request contract periods longer than necessary in order to avoid the 3/4 guarantee when the employer could simply avoid such costs by setting the contract period correctly in the first place. On the other hand, if an employer requested a contract period longer than necessary, it would subject the employer to the very liability GAO believes the employer sought to avoid. Setting the contract period longer than necessary would create a strong incentive for workers not to leave (and not to forfeit their return transportation), but instead remain and collect the 3/4 pay and the return transportation without working. The 3/4 pay would be far more than they would expect to earn by returning to their native country.

Finding:

The three-fourths guarantee is particularly difficult to enforce because the provision is only applicable at the end of the contract period. Because H-2A workers must leave the country within 10 days of the end of the contract, there is only a small window of opportunity to interview the workers in the United States. Regional and district WHD officials said they could not monitor the application of the 3/4 guarantee effectively because they cannot interview workers to confirm their work hours and earnings.

Response:

Whether the 3/4 guarantee was payable to an employee may be calculated from employers' records; workers are unlikely to have the necessary information. See the H-2A 3/4 guarantee regulation at 655.102(b)(6) and the H-2A Handbook at page I-81. Worker interviews could reveal falsification of documents; however, such interviews may be conducted at any time during the employment period. It is not uncommon for Wage and Hour compliance officers to conduct investigations of activities that occurred up to three years in the past.

Finding:

It is difficult to determine the extent to which the 3/4 guarantee is being complied with or violated. . . . For example, in 1997, ranchers employing sheepherders failed to pay them the proper wages under the 3/4 guarantee but no complaint had been filed with WHD. WHD only became aware of the situation because one of the sheepherders was assaulted and a local newspaper publicized the attack. The ranchers admitted they failed to pay the appropriate wages to their sheepherder employees.

Response:

USDA's understanding is the sheepherder was still working under his H-2A contract in a remote location at the time he was assaulted. Thus, no 3/4 guarantee was due or payable. The attendant publicity brought out the fact that he had not received his regular wages when due; the rancher admitted this. The sheepherder asked to be transferred to another employer because he feared the gang that injured him would return to his former location. He subsequently worked for a series of H-2A employers and it may be that his total employment did not meet the 3/4 guarantee. The unresolved dispute is which of the series of employers owe a 3/4 guarantee and how is the liability to be apportioned among them. This incident is not an indication the original employer set the contract period longer than necessary.

Finding:

[T]he three-quarters guarantee does not provide incentives to ensure that the employer makes the worker stay through the end of the contract period.

Response:

It is not clear how an employer could make an employee stay without violating laws that prohibit involuntary servitude. However, there is significant incentive for the employee to stay and collect 3/4 wages without working, receive the return transportation, and maintain eligibility to return to the job the following season.

Finding:

Data from a major employer showed that almost half of their H-2A workers (1,800) left prior to the end of the contract, losing their right to both the three-quarters guarantee and transportation home. This development raises concerns about whether the employer accurately estimated the ending date of need.

Response:

There is only one H-2A association as large as GAO's exemplar. The manager tells USDA that he gave GAO data about his operation, but does not agree with GAO's analysis or conclusion. According to the employer, 1,598 of 4,573 H-2A employees elected not to complete their 7-month contract period. 432 of these employees had completed their spring and summer work but declined to be transferred to fall crops. As a result, it was necessary to import additional H-2A workers to finish the originally-estimated contract period. The cost of bringing in additional workers--paying two-way transportation--was a greater expense than it would have been had the original workers finished their contracts and become eligible for return transportation. He says he has no difficulty arranging work to ensure employees earn their three-quarter guarantee because he is able to transfer them among the members of the association in order to keep them fully employed.

Finding:

Migrant and seasonal regulations provide a guarantee of first week wages for domestic workers.

Response:

There is no general regulation that provides a guarantee of first week wages for domestic workers. The cited guarantee applies to workers recruited through DOL's interstate clearance system which, as noted, produces very few referrals to H-2A employers, frequently none. This guarantee does not apply to workers recruited under a local job order or recruited out-of-state by an agricultural employer.

Finding:

However, officials at the state and federal levels do not apply [the H-2A equivalent treatment] provision to foreign workers, even though they joined worker advocates in expressing concern about the community impact when foreign workers arrived in their areas without work or money to support themselves. In one state, an association of churches reported having to raise money to house and feed foreign H-2A workers hired by local employers who had incorrectly estimated the date of need such that when H-2A workers arrived at the worksite there was no work or wages for several weeks.

Response:

It is not plausible that an H-2A employer would bring in H-2A workers several weeks in advance of the actual date of need because the decision to bring them in is made immediately prior

to the commencement of work. There is no requirement that the employer bring the foreign workers in at the date of need and doing so without available work would subject the employer to liability under the three-quarter guarantee. However, this description does fit an instance in which Puerto Rican workers, recruited under DOL's interstate clearance system, arrived in the United States several weeks after the date of need. By that time, the employers had been forced to forego some of their planting intentions due to lack of sufficient labor and, of course, that reduced the follow-on work to be done. Since Puerto Rican workers are U.S. workers, the employers were required to hire them (and offer the first week guarantee and the 3/4 guarantee) even though they missed the date of need and there was little immediate work to be performed. This problem was not that employers had incorrectly estimated the date of need; it was because the workers were not available on that date of need.

Finding:

Officials from Labor, INS, Agriculture, and State have met in the administration's Domestic Policy Council to discuss the potential for significant increases in the demand for H-2A guestworkers to occur and to develop an appropriate response, if necessary. Officials in Labor and Agriculture that we spoke to said that such discussions continue and that several proposed options continue to be discussed but that they are not available for review.

Response:

These most recent discussion was in August 1996.

CONCLUSIONS

... apply the three quarters guarantee incrementally to smaller periods of time [2-3 weeks] throughout the duration of the contract. ... It is important that any modification of the three quarters guarantee be implemented in a manner that both protects workers but also avoids increasing the administrative complexity of the program.

Response:

GAO correctly found that the three-quarter guarantee is intended to ensure that employers make honest assessments of both the number of workers needed and the time they will be employed, and that prospective workers have some guarantee about the total wages and duration of employment to be accepted. For reasons previously discussed, applying the three-quarter guarantee incrementally would have no effect upon the assessment of the number of workers needed and the period of employment, but it would significantly increase the complexity of the program.

RECOMMENDATION

To simplify the application process and reduce the cost and burden on agricultural employers, we recommend that the Attorney General:

- Delegate authority for approval of H-2A visa petitions from the INS to the Secretary of Labor or his or her designee and revise corresponding regulations as necessary to implement and facilitate such an agreement including a revision of visa extension and appeals procedures.

Response:

USDA supports the elimination of the INS petition process because it adds no value to the admissions process and frequently it is a cause of delay in obtaining foreign workers on a timely basis.

RECOMMENDATION

- amend the regulations to allow H-2A applications to be submitted up to 45, rather than 60 days before the date of need so long as INS does not have a role in the petition approval process.

Response:

USDA supports the recommendation to reduce the application period to 45 days, but we believe the role of INS is relevant to the certification period rather than the application period.

While employers would probably welcome a shorter application requirement, a 45 day application period would not be particularly significant to employers or U.S. workers. Employers might have a slightly better estimate of their dates of need but they would have no better idea whether U.S. workers would report for work as promised--that is determined during the last few days of the application period. Recruitment during the 60- to 45-day interval is not very meaningful to workers as compared to the period near the date of need.

The length of the application period is not critical to U.S. workers' access to jobs with H-2A employers because of the H-2A Fifty Percent Rule. This rule requires, during the first half of the total period of the work contract, the H-2A employer to continue to provide employment to any qualified, eligible U.S. worker who may apply for employment. This requirement continues even though certification has been granted to the employer.

RECOMMENDATION

To protect work opportunities for domestic workers by ensuring that sufficient time is available for agricultural employers to positively recruit domestic workers while reducing the total processing time, we recommend that Congress:

- amend the Immigration and Nationality Act so that, as long as the authority for approval of H-2A visa petitions remains with Labor, Labor would be required to complete all applications at least 7 days before the date of need, rather than 20 days.

Response:

USDA objects to this recommendation. The certification date has no bearing upon work opportunities for domestic workers because positive recruitment is required both before and after certification. An H-2A employer's positive recruitment obligation continues until five days before the date of need (when the foreign workers depart for the United States) and the employer is also required to hire any qualified applicant during the first half of the contract period.

To reduce the certification deadline from 20 days to 7 days prior to date of need would seriously exacerbate the problems caused by late certifications. GAO has reported that, with the 20-day deadline, one-third of DOL's certifications are issued too late to ensure that employers will be able to get workers by the specified date of need and, in 43 instances in 1996, the certification was not issued until after the date of need.

In addition, seven days is insufficient time for notices to be prepared by DOL and received by the employers and the consulates; employers to notify prospective workers to travel--often considerable distances--to the consulate; the consulate to schedule, review, and process the visa application; the workers to travel to the border crossing; INS to review and process the admission and issue immigration documents; and the workers to travel to the job, be processed, housed, and make their preparations to commence work.

RECOMMENDATION

- revise regulations to apply the three quarters guarantee incrementally during the duration of the H-2A contract in a manner which would improve the protection afforded to H-2A workers but also minimizes any additional administrative burden on agricultural employers.

Response:

USDA agrees with GAO that the three-quarter guarantee is intended to ensure that employers make honest assessments of both the number of workers needed and the time they will be employed, so that prospective workers have some guarantee about the total wages and duration of employment to be accepted. It is extremely difficult for an employer to estimate 60 or 45 days in advance the exact period of employment, or such things as the size of the crop to be harvested or the number of days inclement weather may prevent field work. Indeed, meteorologists only claim an 85 percent accuracy rate for weather forecasts 24 hours in advance yet H-2A employers are required to have an accuracy rate of 75 percent over periods of months or years.

As previously discussed, applying the three-quarter guarantee incrementally would have no effect upon the assessment of the number of workers needed and the period of employment. But it would significantly increase the complexity of the program and subject employers to penalties for the inability to make virtually impossible long-term estimates with little opportunity to make adjustments in order to meet their obligation. Under the present system, employers can make mid-course adjustments in order to meet their original estimates by the end of the contract period.

GAO Contacts and Staff Acknowledgments

GAO Contacts

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Appendix XI
GAO Contacts and Staff Acknowledgments

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Related GAO Products

Illegal Immigration: Southwest Border Strategy Results Inconclusive; More Evaluation Needed (GAO/GGD-98-21, Dec. 11, 1997).

Passports and Visas: Status of Efforts to Reduce Fraud (GAO/NSIAD-96-99, May 9, 1996).

Border Patrol: Staffing and Enforcement Activities (GAO/GGD-96-65, Mar. 11, 1996).

Illegal Immigration: INS Overstay Estimation Methods Need Improvement (GAO/PEMD-95-20, Sept. 26, 1995).

Illegal Aliens: National Net Cost Estimates Vary Widely (GAO/HEHS-95-133, July 25, 1995).

Illegal Aliens: Assessing Estimates of Financial Burden on California (GAO/HEHS-95-22, Nov. 28, 1994).

Benefits for Illegal Aliens: Some Program Costs Increasing, but Total Costs Unknown (GAO/T-HRD-93-33, Sept. 29, 1993).

Illegal Aliens: Despite Data Limitations, Current Methods Provide Better Population Estimates (GAO/PEMD-93-25, Aug. 5, 1993).

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Foreign Farm Workers in U.S.: Department of Labor Action Needed to Protect Florida Sugar Cane Workers (GAO/HRD-92-95, June 30, 1992).

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Immigration Reform: Potential Impact on West Coast Farm Labor (GAO/HRD-89-89, Aug. 17, 1989).

The H-2A Program: Protections for U.S. Farmworkers (GAO/PEMD-89-3, Oct. 21, 1988).



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